Supreme Court, U.S.
FILED
JUL 5 1995
OFFICE OF THE CLERK

NO. 95-53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

FRANK J. PERAGINE
JAMES A. BURTON*
J. THOMAS HAMRICK, JR.
SIMON, PERAGINE, SMITH
& REDFEARN, L.L.P.
1100 Poydras Street
30th Floor - Energy Centre
New Orleans, Louisiana 70163-3000
Telephone: (504) 569-2030
Counsel for Petitioner
*Counsel of Record

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

63pp

QUESTION PRESENTED

Whether, under the Commerce Clause of the United States Constitution, the State of Louisiana may impose its use tax on natural gas used as compressor fuel in a purely interstate pipeline system, when the compressor fuel is tapped directly from the instrumentality of interstate commerce itself — i.e., the main pipeline which carries the commingled gas stream continuously and uninterruptedly on its interstate journey — and is consumed immediately in the compressor engines to push the remainder of the gas on its interstate journey.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Columbia Gulf Transmission Company ("Columbia Gulf") is a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Charleston, West Virginia. Pursuant to Rule 29.1 of the Rules of this Court, Columbia Gulf states that its parent corporation is the Columbia Gas System, Inc., also a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Wilmington, Delaware. Columbia Gulf has no subsidiaries, wholly owned or otherwise.

Respondent Ralph Slaughter, Secretary of the Department of Revenue and Taxation, State of Louisiana, is the duly appointed and currently serving Secretary of the Louisiana Department of Revenue and Taxation. He is the person who is charged by statute with administering Louisiana's use tax.

TABLE OF CONTENTS

Page:

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

LOUISIANA CANNOT IMPOSE ITS USE TAX DIRECTLY UPON AN ARTICLE WHICH IS CONSUMED WHILE IN THE FLOW OF INTERSTATE COMMERCE, WITHOUT EVER COMING TO REST WITHIN THE STATE OF LOUISIANA 9

A. Conflicts Among the Highest Courts of the Several States 9

B. *Helson* Remains the Controlling Authority 11

C. Summary 19

TABLE OF CONTENTS (cont'd)

Page:

CONCLUSION 20

APPENDICES

A. Opinion of the Supreme Court of Louisiana rendered on April 10, 1995 ..... A-1

B. Opinion of the Louisiana Court of Appeal, First Circuit entered on May 20, 1994 ..... A- 9

C. Judgment of Judge Bob Hester of the 19th Judicial District Court entered on April 27, 1993 ..... A-14

D. La.R.S. 47:302 ..... A-17

TABLE OF AUTHORITIES

Page:

CASES:

Columbia Gulf Transmission Co. v.
Broussard, 637 So. 2d 733,
(La. App. 1st Cir. 1994),
reversed, 653 So. 2d 522 (La. 1995) 2,5,6

Commonwealth Edison Company v. Montana,
453 U.S. 609, 101 S. Ct. 2946,
69 L. Ed. 2d 884, reh. den., 453 U.S. 927,
102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981) 12,13,14,15,16

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326,
reh. den., 430 U.S. 976, 97 S. Ct. 1669,
52 L. Ed. 2d 371 (1977) 6,9,11,12,15,16,17

D.H. Holmes Co., Ltd. v. McNamara,
486 U.S. 24, 108 S. Ct. 1619,
100 L. Ed. 2d 21 (1988) 18

Edelman v. Boeing Air Transport, Inc.,
289 U.S. 249, 53 S. Ct. 591, 77 L. Ed. 1155
(1933) 15

Heisler v. Thomas Colliery Co.,
260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237
(1922) 13-14

TABLE OF AUTHORITIES (cont'd)

Page:

CASES:

Helson & Randolph v. Kentucky,
279 U.S. 245, 49 S. Ct. 279,
73 L. Ed. 683 (1929) 6-16,19

Hope Natural Gas Co. v. Hall,
274 U.S. 284, 47 S. Ct. 639,
71 L. Ed. 1049 (1927) 13

McNamara v. D.H. Holmes, 505 So. 2d 102
(La. App. 4th Cir. 1987), writ den.,
506 So. 2d 227, aff'd, 486 U.S. 24,
108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988) 5

Michigan-Wisconsin Pipe Line Co. v. Calvert,
347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583
(1954) 15-16

Michigan Wisconsin Pipe Line Co. v. State,
227 N. W. 2d 334 (Mich. App., Div. 2, 1975) 10,11,19

Midwestern Gas Transmission Co. v.
Wisconsin Department of Revenue,
267 N. W. 2d 253 (Wis. 1978), cert den.,
439 U.S. 997, 99 S. Ct. 598,
58 L. Ed. 2d 670 (1978) 8,11,19

Nashville, Chattanooga & St. Louis R. Co. v. Wallace,
288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (1933) 15

Oklahoma Tax Commission v. Jefferson
Lines, Inc., ___ U.S. ___, 115 S. Ct. 1331,
131 L. Ed. 2d 261 (1995) 18

TABLE OF AUTHORITIES (cont'd)

Page:

CASES:

Oliver Iron Mining Co. v. Lord,
262 U.S. 172, 43 S. Ct. 526,
67 L. Ed. 929 (1923) 13

Ozark Pipe Line Corp. v. Monier,
266 U.S. 555, 562, 45 S. Ct. 184,
69 L. Ed. 439 (1925) 14

Pledger v. Arkla, 309 Ark. 10, 827 S. W. 2d 126,
cert den., ____ U.S. ____, 113 S. Ct. 203,
121 L. Ed. 2d 144 (1992) 8

Questar Pipeline Co. v. Utah State Tax
Commission, 817 P.2d 316 (Utah 1991) 8

Spector Motor Service, Inc. v. O'Connor,
340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573
(1951) 16,17

Tennessee Gas Pipeline Co. v. Marx,
594 So. 2d 615 (Miss.1992) 8

Texas Gas Transmission Corp. v. Benson,
444 S. W. 2d 137 (Tenn. 1969) 8,9,10,11,19

United Air Lines, Inc. v. Mahin,
410 U.S. 623, 93 S. Ct. 1186,
35 L. Ed. 2d 545 (1973) 15-16

TABLE OF AUTHORITIES (cont'd)

Page:

CONSTITUTION:

Article 1, §8, Cl. 3 2,4

STATUTES:

Federal:

15 U.S.C. §717, *et seq.* 3

28 U.S.C. §1257(a) 2

Louisiana Revised Statutes:

La. R.S. 47:302 3

La. R.S. 47:305(E)(i) 19

La. R.S. 47:1576 4

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 13 2

No. 95-____

In The
Supreme Court of the United States

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF
THE DEPARTMENT OF REVENUE AND TAXATION,
STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Columbia Gulf Transmission Company respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Louisiana rendered in the above-entitled proceedings on April 10, 1995.

OPINIONS BELOW

The Opinion of the Supreme Court of Louisiana rendered on April 10, 1995 (App. A, *infra* at A-1) is reported at 653 So 2d 522.

The Opinion of the Louisiana Court of Appeal, First Circuit entered on May 20, 1994 (App. B, *infra* at A-9) is reported at 637 So. 2d 733.

The Judgment (App. C, *infra* at A-14) of Judge Bob Hester of the Nineteenth Judicial District Court, for East Baton Rouge Parish, Louisiana entered on April 27, 1993, is unreported.

JURISDICTION

The judgment of the Supreme Court of Louisiana (App. A, *infra*, A-1) was rendered on April 10, 1995. The jurisdiction of this Court in invoked under the provisions of 28 U.S.C. §1257(a) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional:

Article 1, §8, Cl. 3. Powers of Congress. The Congress shall have Power . . .

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Statutory:

The basic Louisiana sales tax and use tax provisions are set forth in La. R.S. 47:302 (App. D, *infra*, A-17).

STATEMENT OF THE CASE

Petitioner, Columbia Gulf Transmission Company ("Columbia Gulf") is in the sole business of transporting natural gas in interstate commerce. It has interstate transmission facilities (pipelines and compressor stations) offshore Louisiana in the Gulf of Mexico and in the states of Louisiana, Mississippi, Tennessee and Kentucky. Practically all of Columbia Gulf's activities with respect to its interstate transmission pipelines are subject to regulation and control by the Federal Energy Regulatory commission ("FERC") pursuant to the Natural Gas Act (15 U.S.C. §717, *et seq.*).

At issue in these proceedings is the constitutionality of the imposition of a use tax by the State of Louisiana on the value of natural gas which is withdrawn by Columbia Gulf directly from the gas stream being transmitted in its interstate transmission pipelines, and burned as compressor fuel for the sole purpose of pushing the remainder of the same gas stream on its interstate journey. The four compressor stations in Louisiana, located at Pecan Island, Rayne, Alexandria and Delhi, were constructed and are operated under the authority of Certificates of Public Convenience and Necessity issued by FERC (or its predecessor, the Federal Power Commission). These compressor stations are functionally identical, and are used exclusively to move natural gas through Columbia Gulf's interstate transmission pipelines.

Columbia Gulf properly paid the use tax under protest and sued for a refund, alleging specifically in its initial pleading that

the imposition of the tax "is an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3." Columbia Gulf's Petition, paragraph 5. In support of its motion for summary judgment in the trial court, Columbia Gulf submitted evidence — all of which was undisputed — establishing that its only business is the interstate transportation of natural gas through the State of Louisiana to destinations outside of the State; that all of the gas in Columbia Gulf's pipelines is in the continuous, uninterrupted stream of interstate commerce; that some of the gas in the stream is extracted and used solely and immediately to power compressor facilities ("compressor fuel") to enable the remainder of the commingled gas stream to continue its interstate journey; that all of the gas upon which the State has sought to impose the use tax is such compressor fuel; and that Columbia Gulf has properly paid such use tax under protest pursuant to La.R.S. 47:1576 since August, 1988, and for each month thereafter.[1]

Columbia Gulf's major Louisiana compressor stations are located approximately 85 miles apart, and all serve exactly the same purpose: increasing the pressure of the natural gas in the pipeline system to enable the gas to continue on its interstate journey to the next compressor station or point of further distribution. To accomplish this, a small amount of gas is tapped directly out of the main line, diverted into either a gas turbine or reciprocating engine, and consumed immediately as fuel to drive

---

[1] No other material facts alleged by Columbia Gulf were controverted, including the purely interstate nature of Columbia Gulf's operations, the flow of gas from the point of production (typically in the federal waters offshore Louisiana) through the pipelines and compressor stations, into Mississippi, Tennessee and Kentucky.

the engines which compress the remainder of the gas stream. The only purpose for tapping into the main pipeline and removing the compressor fuel is to enable the balance of the gas stream to continue its interstate journey without interruption through and beyond the State of Louisiana.

Columbia Gulf's facilities within the State of Louisiana are regulated almost entirely at the federal level, because their business is the interstate transportation of gas. The main regulatory agencies overseeing the Columbia Gulf facilities are the FERC, the United States Department of Transportation, and the National Transportation Safety Board.

The trial court granted summary judgment in Columbia Gulf's favor without assigning written reasons. The Court of Appeal affirmed unanimously and concluded that since ". . . Louisiana may not statutorily impose a use tax on the gas at issue, we need not address the parties' constitutional arguments." 637 So. 2d at 735, App. B at p. A-12. As that court explained:

> The uncontradicted evidence established that the compressor fuel does not "come to rest" in this state, nor does it form a part of the "mass of property in this state." The fuel is diverted from an interstate pipeline system and is consumed immediately as an integral part of the interstate transportation of natural gas. It is therefore beyond the scope of the use tax, and the trial court correctly granted Columbia's motion for summary judgment.

637 So. 2d at 735-36, App. B at p. A-13.

The Supreme Court of Louisiana granted a writ of review "to consider a possible conflict with *McNamara v. D.H. Holmes*,... 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988), and to

otherwise determine whether the summary judgment was legally correct".[2] It subsequently reversed the judgments of the lower courts, concluding that the compressor fuel was taxable under Louisiana's statutory scheme. The Supreme Court of Louisiana thereby found Louisiana's use tax to be coextensive with the Commerce Clause of the United States Constitution. However, even having so reasoned, the Court disregarded the uncontradicted facts established in the record — namely that the natural gas compressor fuel is in the continuous and uninterrupted flow of interstate commerce — in reaching its ultimate conclusion that the tax is constitutional.[3] In reaching that conclusion, the Louisiana Supreme Court mischaracterized this Court's decision in *Helson* as "superseded",[4] misinterpreted this Court's decision in *Complete Auto Transit*, and relied on decisions involving similar facts from the Supreme Courts of Arkansas, Mississippi and Utah, while rejecting decisions from the highest courts of Wisconsin and Tennessee.

---

[2] 653 So. 2d at 523, App. A at p.A-2.

[3] Indeed, as Judge Norris (participating as Associate Justice Pro Tempore) stated in his dissent:

> The Majority ignores the record below; Columbia's Vice President of Operations, by sworn affidavit, stated that the fuel never comes to rest, but rather flows continuously without interruption from the interstate pipeline until it is consumed only seconds later in the compressor engines. Significantly, the State never contested this.

653 So. 2d at 525, App. A at p.A-6.

[4] 653 So. 2d at App. A at p. A-3.

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its use tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, a portion of a natural gas stream which is clearly being transported in interstate commerce is consumed, without ever coming to rest in Louisiana, in order to provide the energy necessary to move the remainder of the commingled natural gas stream onward in its uninterrupted interstate journey. The State of Louisiana, by executive fiat and now with the approval of its Supreme Court, has imposed its use tax directly upon the value of that portion of the natural gas stream so consumed. This Court has never authorized nor permitted the imposition of a use tax directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sales or use tax has become a part of the mass of the physical property of the taxing state.

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. The prohibition established by this Court in *Helson* has never been overruled. The majority opinion of the Supreme Court of Louisiana failed to follow this principle; indeed, that court mistakenly referred to *Helson* as having been "superseded."

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state use tax directly upon fuel consumed in the stream of interstate commerce. While the decision of the Supreme Court of Louisiana below is in accord

with recent decisions of the highest courts of Arkansas,[5] Mississippi[6] and Utah,[7] it is diametrically opposed to decisions of the highest courts of Wisconsin[8] and Tennessee[9] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts, and now that of Louisiana, totally disregarded this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the rule of *Helson* was the controlling law in this factual situation.

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict of opinion between decisions of this Court and the Supreme Court of Louisiana, and between the highest courts of several states. These conflicts can only be resolved by this Court. The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions**. Are the decisions of the Supreme

---

[5] *Pledger v. Arkla*, 309 Ark. 10, 827 S.W.2d 126, cert. den. ___ U.S. ___, 113 S. Ct. 203, 121 L. Ed. 2d 144 (1992).

[6] *Tennessee Gas Pipeline Co. v. Marx*, 594 So. 2d 615 (Miss.1992).

[7] *Questar Pipeline Co. v Utah State Tax Commission*, 817 P.2d 316 (Utah 1991).

[8] *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), cert den., 439 U.S. 997, 99 S. Ct. 598, 58 L. Ed. 2d 670 (1978).

[9] *Texas Gas Transmission Corp. v. Benson*, 444 S.W. 2d 137 (Tenn. 1969).

Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, and now Louisiana, correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? (Addressed in Section A below.)

2. **Controlling Decision.** Has the decision in *Helson*, which was subsequently cited with approval by this Court in 1973 and 1981, been superseded by the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, reh. den., 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977), such that *Helson* is no longer the controlling authority on this issue? (Addressed in Section B below.)

LOUISIANA CANNOT IMPOSE ITS USE TAX DIRECTLY UPON AN ARTICLE WHICH IS CONSUMED WHILE IN THE FLOW OF INTERSTATE COMMERCE, WITHOUT EVER COMING TO REST WITHIN THE STATE OF LOUISIANA

A. Conflicts Among the Highest Courts of the Several States.

The first judicial resolution of this particular issue, i.e. the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. *Texas Gas Transmission Corp. v. Benson, supra,* note 9, involved both a factual situation and a state taxing statute essentially identical to those at issue here. In that case, the Tennessee Supreme Court stated:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor

> engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. *It is, therefore, a necessary and integral part of the interstate operation.*
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.
>
> *Moreover, we agree with the Chancellor the case of Helson v. Commonwealth of Kentucky, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), is controlling.*

444 S.W.2d 137, 139 (emphasis added).

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State*, 227 N.W.2d 334 (Mich. App., Div. 2, 1975):

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson*, supra. The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly

> the same purpose. In either case, the tax is upon the instrument of commerce.

227 N.W.2d 334, 336.

The Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

In 1978, one year after this Court's decision in *Complete Auto Transit, Inc. v. Brady, supra*, the Supreme Court of Wisconsin reached a similar conclusion in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue, supra* note 8. In that case, the court largely followed *Helson, Texas Gas* and *Michigan Wisconsin Pipe Line Company*. It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. This Court denied certiorari.

Thus, the decision of the Supreme Court of Louisiana in these proceedings, as well as the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, are in direct, irreconcilable conflict with the foregoing decisions of the Supreme Courts of Tennessee and Wisconsin and the appellate court of Michigan on this important federal question involving the state taxation of interstate commerce.

B. *Helson* Remains the Controlling Authority.

In deciding to follow the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, the Supreme Court of Louisiana

first opined that this Court's long-standing precedent in *Helson* had been "superseded" by *Complete Auto Transit*. Indeed, this Court has never superseded, overruled or otherwise repudiated its decision in *Helson*. Nor has this Court ever pronounced that the *only* test to be applied in Commerce Clause cases is the four-prong test of *Complete Auto Transit*. In fact, only four years after this Court's decision in *Complete Auto Transit*, the Court clearly stated in *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L. Ed. 2d 884, reh. den., 453 U.S. 927, 102 S. Ct. 889, 69 L. Ed. 2d 1023 (1981), that cases utilizing the *Helson* rationale were still applicable in certain instances. As the record clearly demonstrates, this case presents at least one of those instances.

Helson states this Court's rule on fuel used solely to power the continuous flow of interstate commerce. In *Helson*, Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the borders of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed in that state to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is a little more than repetitious to say that such a tax cannot

> be laid upon *the use of a medium by which such transportation is effected.*

279 U.S. 245, 252; 49 S. Ct. 279, 281; 73 L. Ed. 683, 687.

The undisputed facts established in this case are even stronger for the legal proposition advanced by Columbia Gulf here, than were the facts in *Helson*. Here, the compressor fuel is an indistinguishable part of the continuously moving, commingled stream of natural gas in question — the very "cargo" being transported in interstate commerce. The use tax which Louisiana seeks to impose in this case is being imposed not only on the *instrumentalities* of interstate commerce such as fuel, but directly upon the value of a part of the commodity — the compressor fuel — which itself is being transported in interstate commerce.

More recently, in *Commonwealth Edison, supra* at 12, this Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or intrastate in character. In that decision, which cited *Helson*, this Court at least tacitly indicated the continued validity of *Helson*:

> In this regard, the Montana court relied on this Court's decision in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237, (1922), *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923), and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.
>
> * * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., *Helson & Randolph v. Kentucky*, 279 U.S. 245, 250-252, 49 S. Ct. 279, 280-81, 73 L. Ed. 683 (1929); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 562, 45 S. Ct. 184, 185, 69 L. Ed. 439 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved.

453 U.S. 609, 614-15 and 617; 101 S. Ct. 2946, 2951-2953; 69 L. Ed. 2d 884, 892 and 894. But the Court made clear in a following footnote:

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided**.

(Emphasis supplied.) 453 U.S. 609, 617; 101 S. Ct. 2946, 2953; 69 L. Ed. 2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 93 S. Ct. 1186, 35 L. Ed. 2d 545 (1973), noted the continuing validity of the *Helson* rationale:

> We hold that *Edelman* [*v. Boeing Air Transport, Inc.*, 283 U.S. 249, 53 S. Ct. 591, 7 L. Ed. 1155 (1933)] and *Nashville* [*Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933)] support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.
>
> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-*

> *Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954), nor by the State in which it is merely consumed, under *Helson*. (Emphasis supplied.) 410 U.S. 623, 629-30; 93 S. Ct. 1186, 35 L. Ed. 2d 545, 552-53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

The Supreme Court of Louisiana ignored *Helson*, and treated that precedent as if it did not exist. Thus, under the decision of the Supreme Court of Louisiana, the value of the fuel for boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Louisiana, but while within the confines of interstate commerce, may be directly subjected to Louisiana's use tax, subject only to the limitations announced by this Court in *Complete Auto Transit*.

From this Court's decisions there have evolved certain restrictions (and liberties) on the states' powers to impose their taxes upon entities engaged in interstate commerce. Although this Court's decision in *Complete Auto Transit* (1977) did away with the rule announced in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951) — that no direct tax could be imposed upon interstate commerce or the privilege of doing interstate business — Columbia Gulf submits that both *Spector* and *Complete Auto Transit* addressed indirect taxes on the privilege of doing interstate business. While there has certainly been an expansion of the concept announced in *Complete Auto Transit*, and this Court has consistently held that interstate commerce may be obliged to bear its fair share of

the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of a portion of a commodity during its interstate journey, with which it is indistinguishably commingled and from which it is extracted solely for the purpose of propelling the commodity.

Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit*, from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi, determined upon the gross sales or gross income derived from the activity within the State of Mississippi. The taxpayer, in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi, was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax on the **value** of the vehicles being moved in interstate commerce; rather, it was a tax based on the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test to determine the validity of a state tax affecting interstate commerce:

1 - The activity must be sufficiently connected to the state to justify the tax (the *nexus* requirement).

2 - The tax must be *fairly related* to benefits provided by the state to the taxpayer.

3 - The tax must not *discriminate* against interstate commerce.

4 - The tax must be *fairly apportioned.*

In this case, the Supreme Court of Louisiana granted a writ of review for the stated purpose of determining whether the lower courts' decisions conflict with this Court's decision in *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988). That decision does not require, or even support, the Supreme Court of Louisiana's decision in this case. Although the same Louisiana tax statutes were involved, the facts in *D.H. Holmes* are easily distinguished. In *D.H. Holmes*, the items taxed were catalogs that the parties conceded came to rest in Louisiana. Moreover, the taxpayer engaged in extensive intrastate sales through a large chain of department stores located in Louisiana, generated and supported by the catalogs. Here, there is no dispute that Columbia Gulf's activities are purely interstate and the tax has been imposed on the very fuel of interstate commerce. That same distinction is critical in this Court's most recent pronouncement on the issue, in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, ___ U.S. ___, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), which permitted Oklahoma to impose its sales tax on bus tickets sold for interstate travel, on the rationale that the sale of the tickets was a wholly local transaction.

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has never authorized the direct imposition of an unapportioned excise tax upon the value of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas*, *Texas Gas*, and *Michigan Wisconsin Pipe Line v. State*, the facts are undisputed that the natural gas which Louisiana seeks to tax in these proceedings never was removed from interstate commerce and never came to rest within the State of Louisiana before it was consumed as fuel for the interstate compressors — totally within the confines of the interstate pipeline system and in furtherance of the interstate journey.

C. Summary.

Louisiana recognizes that its taxing power does not extend to "bona fide interstate commerce". La.R.S. 47:305(E)(1). However, if the compressor fuel at issue here can be taxed, then airline fuel consumed by planes passing over the several states can be taxed by those states, diesel fuel burned by the trains and trucks passing through Louisiana or any other state and by boats moving barges on navigable streams in Louisiana or any other state can likewise be taxed.

The prohibition of state taxation established by this Court in *Helson* covers precisely the type of state tax that is imposed in this situation. This Court should address the Supreme Court of Louisiana's mischaracterization of *Helson* as "superseded" and the conflict among the several states which have accepted *Helson* or failed to recognize its continued validity.

CONCLUSION

For the foregoing reasons, Columbia Gulf submits that its Petition for a Writ of Certiorari to the Supreme Court of Louisiana should be granted.

Respectfully submitted,

FRANK J. PERAGINE
JAMES A. BURTON*
J. THOMAS HAMRICK, JR.
SIMON, PERAGINE, SMITH
& REDFEARN, L.L.P.
1100 Poydras Street
30th Floor - Energy Centre
New Orleans, Louisiana 70163-3000
Telephone: (504) 569-2030
Counsel for Petitioner
*Counsel of Record

July ___, 1995

APPENDICES

APPENDICES

APPENDIX A. Opinion of the Supreme Court of Louisiana rendered on April 10, 1995 ..... A-1

APPENDIX B. Opinion of the Louisiana Court of Appeal, First Circuit entered on May 20, 1994 ..... A-9

APPENDIX C. Judgment of Judge Bob Hester of the 19th Judicial District Court entered on April 27, 1993 ..... A-14

APPENDIX D. La.R.S. 47:302 ..... A-17

APPENDIX A

SUPREME COURT OF LOUISIANA

NO. 94-C-1650

COLUMBIA GULF TRANSMISSION COMPANY

VERSUS

ARNOLD A. BROUSSARD, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA

ON WRIT OF REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

WATSON, Justice. [1]

The primary issue is whether LSA-R.S. 47:305E(1) or the United States Constitution's Commerce Clause prohibits a Louisiana use tax on "compressor fuel". Compressor fuel is natural gas which is diverted from an interstate pipeline to power the compressors which propel the natural gas through the pipeline.

FACTS

Columbia Gulf Transmission Company, a Delaware corporation doing business in Louisiana, transports natural gas from

---

[1] Judge William Norris, III, Court of Appeal, Second Circuit, participating as Associate Justice Pro Tempore, in place of Associate Justice Pike Hall, Jr.

Dennis, J., not on panel. Rule IV, §3.

offshore Louisiana to its affiliate in Kentucky through underground interstate pipelines. The gas loses pressure during the journey and is recompressed at four Louisiana compressor stations. Some of the pipeline gas is diverted to the compressor stations, where it powers the engines which boost the interstate gas pressure. The Louisiana Department of Revenue and Taxation seeks to impose a use tax on the compressor fuel which is consumed within the state.

In October of 1988, Columbia filed a petition to recover $10,717.77 in use taxes paid under protest. (Columbia agreed to escrow the use taxes for future months.) Columbia argued that a use tax on natural gas diverted from interstate gas and used solely to propel other interstate gas violates the Commerce Clause of the United States Constitution. Columbia also contended that the compressor fuel does not satisfy the requirements of R.S. 47:305E(1).

The trial court granted Columbia's motion for summary judgement, and the court of appeal affirmed. *Columbia Gulf Transmission v. Broussard,* 93 1161 (La. App. 1st Cir. 5/20/94), 637 So.2d 733. A writ was granted, 94-1650 (La. 10/7/94), 644 So.2d 626, to consider a possible conflict with *McNamara v. D.H. Holmes Co.,* 505 So.2d 102 (La. App. 4th Cir. 1987), writ denied, 506 So.2d 1227, aff'd, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988), and to otherwise determine whether the summary judgment was legally correct. *McNamara* held that Louisiana's use tax on department store catalogs mailed into the state by out-of-state printers was valid.

LSA-R.S. 47:305E intends: "to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state."

The statute clearly intends taxation of property consumed in the state. Columbia contends that the natural gas consumed as compressor fuel has not come to rest in the state and has not

become a part of the mass of property in the state. One state has held that compressor fuel does not come to rest and become a part of the state's mass of property merely because it is consumed. *Texas Gas Transmission Corp. v. Benson,* 223 Tenn. 279, 444 S.W.2d137 (1969). We disagree.

When the natural gas compressor fuel is consumed, it comes to rest and becomes a part of the state's property. Fuel must necessarily come to rest as it is consumed. If ceases to exist; it is terminated; it is used in Louisiana; it cannot be taxed in another state. Thus, the natural gas is subject to tax when it is consumed in the state under the language of the statute.

The next question is whether this use taxation is permitted by the Commerce Clause of the United States Constitution. *Helson v. Commonwealth of Kentucky,* 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929), decided that a use tax on fuel consumed by an interstate ferry boat was an unconstitutional burden on an instrumentality of interstate commerce. *Midwestern Gas v. Wisconsin Dept. of Revenue*, 84 Wis.2d 261, 267 N.W.2d 253 (1978), cert. denied 439 U.S. 997 (1978), and *Michigan Wisconsin Pipe Line v. State,* 58 Mich. App. 318, 227 N.W.2d334 (1975), two other compressor fuel cases, were decided on Commerce Clause grounds. Both followed *Helson.* However, *Helson* has been superseded by *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Under *Complete Auto Transit, Inc. v. Brady,* a state tax statute which affects interstate commerce may survive a commerce clause challenge if the tax: (1) is applied to an activity having a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the state's services.

Questar Pipeline v. Tax Com'n, 817 P.2d 316 (Utah 1991), held that gas used by a pipeline company's Utah compressor stations was subject to the state's use tax. *Questar* decided that consumption of the compressor fuel came within the state's statute and met the Commerce Clause test of *Complete Auto.* Simi-

larly, in *Pledger v. Arkla, Inc.*, 309 Ark. 10, 827 S.W.2d 126 (1992), cert. denied ___ U.S. ___, 113 S.Ct. 203, 121 L.Ed.2d 144 (1992), the Arkansas Supreme Court determined that compressor fuel consumed in the state was subject to the state sales tax. The Arkansas Court relied on *Complete Auto* and noted that the gas consumed in Arkansas would not be subject to taxation in any other state.

Columbia's gas production has a substantial nexus with the State of Louisiana. Columbia's pipeline and four compressor stations carry natural gas from offshore Louisiana to the state's borders. Columbia pays Louisiana taxes on its employees and activity in the state.

There is no discrimination against interstate commerce. The tax is applied equally to intrastate and interstate pipelines. Gas in interstate commerce is taxed equally with intrastate gas when both are consumed within the state.

The tax is fairly apportioned because it is imposed only on gas actually consumed in Louisiana's compressor stations. The gas is measured as it is removed and consumed. No other state can tax the same gas. The tax is fairly related to benefits provided by Louisiana. Columbia's employees enjoy Louisiana's roads, schools, fire and police protection. Columbia has the right to expropriate Louisiana private property. LSA-R.S. 19:2(5). Columbia's compressor fuel is fairly taxed because of the company's "significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 33,108 S.Ct. 1619, 1624, 100 L.Ed.2d 21, 29 (1988).

Mississippi imposes a tax on the natural gas used to fuel Mississippi compressors. *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992). *Marx* held that use taxes on compressor fuel met the four prongs of the *Complete Auto* test and did not violate the Commerce Clause.

Since the use tax on compressor fuel is valid under the

Louisiana statute and the United States Constitution's Commerce Clause, a secondary issue arises and that is the Department of Revenue and Taxation's right to attorney's fees under LSA-R.S. 47:1512. The statue provides:

> The collector is authorized to employ private counsel to assist in the collection of any taxes, penalties or interest due under this Sub-title, or to represent him in any proceeding under this Sub-title. If any taxes, penalties or interest due under this title are referred to an attorney at law for collection, an additional charge for attorney fees, in the amount of ten per centum (10%) of the taxes, penalties and interest due, shall be paid by the tax debtor.

The collector employed private counsel to represent the state in the appeal of this case and a ten percent surcharge for attorney's fees may be due by tax debtor.

For the foregoing reasons, the summary judgment in favor of Columbia Gulf Transmission Company is reversed, and the case is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

LEMMON, J., concurs and assigns reasons. *
NORRIS, J. dissents and assigns reasons.

NORRIS, J., Dissenting.

I respectfully dissent. Columbia has met its burden of proving its entitlement to summary judgment under La. R.S. 47:305 E.

First, there is no genuine issue as to material fact. The majority ignores the record below; Columbia's Vice President of Operations, by sworn affidavit, stated that the fuel never comes to rest, but rather flows continuously without interruption from the interstate pipeline until it is consumed only seconds later in the compressor engines. Significantly, the State never contested this.

Columbia is also entitled to summary judgment as a matter of law. As noted by the majority, R.S. 47:305 E intends taxation of property consumed in the state. More specifically, however, the statute intends to tax the consumption of the fuel only *after* it has come to rest in this state and formed a part of the mass of property in this state. In fact, this language defines the bounds of taxation as the legislature has clearly expressed its intent *not to tax bona fide interstate commerce*. We must construe this statute in light of the law as it existed at the time of its enactment. *Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 248 La. 49, 176 So.2d 425 (1965). Notably, although the legislature has periodically amended other provisions under § 305, it has never changed this language.

Though quick to reject Tennessee jurisprudence precisely on point, neither the State nor the majority has provided any legal authority for the proposition that compressor fuel under these facts comes to rest and forms a part of the mass of property in this state prior to its consumption. Moreover, in my opin-

---

* As of the date of this printing, Justice Lemmon's concurrence has not yet been filed.

ion the majority misstates the holding in *Benson*. The court did not address whether the gas came to rest when it was consumed; rather the key issue was whether the fuel came to rest at any time between its separation from the mainline and its ultimate consumption in the compressor engine, and the court held it did not. The majority also omits any discussion of *Michigan Wisconsin Pipe Line Co. v. State*, 58 Mich. App. 318, 227 N.W.2d 334 (1975) and *Midwestern Gas Transmission Co. v. Department of Revenue*, 84 Wis. 2d 261, 267 N.W.2d 253 (1978), cases from two other states which have favorably cited *Benson* and rejected a tax on compressor fuel under the same facts. In both cases, the courts determined that the compressor fuel never came to rest in the state and that is consumption was a necessary and integral part of interstate commerce. See *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929). In relying on *Helson*, these courts applied the federal jurisprudence in effect at that time, imposing a *per se* ban on taxing interstate commerce; it was therefore necessary to establish whether the transaction at issue was interstate commerce, an integral part of interstate commerce or sufficiently removed from interstate commerce.

Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), has superseded *Helson* insofar as federal law now recognizes that interstate commerce may be subject to taxation in some instances; the court's decision, however, does not *require* states to tax interstate commerce to the fullest extent allowed by federal law. Many other states' sales/use tax statutes are expressly coextensive with federal law; they prohibit the tax only when it is prohibited by the constitution or laws of the United States. See *Kellogg Company v. Department of Treasury*, 204 Mich. App. 489, 516 N.W. 2d 108 (1994); *Questar Pipeline Co. v. State Tax Commission*, 817 P.2d 316 (Utah 1991); *Midwestern Gas Transmission Co. v. Department of Revenue*, supra. However, Louisiana has retained both the sales/use tax exclusion barring a tax on interstate commerce and

the language narrowly defining the transactions deemed to be outside of interstate commerce. The rational in *Helson* remains relevant to this inquiry. Moreover, the exclusion is to be construed liberally in favor of the taxpayer and against the taxing authority. *Tarver v. World Ship Supply Co.*, 615 So.2d 423 (La. App. 4th Cir.), writ denied, 616 So.2d 672 (1993), quoting Oreck, *Louisiana Sales & Use Taxtion*, § 3.1.

The exercise of the power of taxation is vested exclusively in the state legislature. *Radiofone Inc. v. City of New Orleans*, 93-0962 (La. 1/14/94), 630 So.2d 694. It is our duty to apply the law as written and give effect to the legislative intent as it exists today. The majority, with a mere wave of the hand, has effectively dismissed the "comes to rest" requirement under our law. The decision to remove the *per se* ban on taxing interstate commerce and its accompanying limitations properly lies with the legislature, not this court.

Because Columbia has shown that the compressor fuel does not come to rest and form a part of the mass of property in this state, and Louisiana law expressly excludes the taxation of interstate commerce, I would affirm the lower courts's grant of summary judgment.

APPENDIX B

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. CA 93 1161

COLUMBIA GULF TRANSMISSION COMPANY
VERSUS
ARNOLD A. BROUSSARD,
SECRETARY, LOUISIANA DEPARTMENT OF
REVENUE AND TAXATION

Judgment rendered May 20, 1994

* * * *

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 336, 283

Honorable Bob Hester, Judge

* * * *

Mr. James A. Burton Mr. J. Thomas Hamrick New Orleans, LA	Attorneys for Plaintiff-Appellee Columbia Gulf Transmission Company
Mr. Robert G. Pugh Shreveport, LA	Attorney for Defendant-Appellant Ralph Slaughter, Secretary Department of Revenue and Taxation, State of Louisiana

* * * *

BEFORE: Foil, Pitcher and Parro, JJ.

FOIL, JUDGE.

At issue in this appeal is whether Louisiana may impose a use tax on natural gas used exclusively to fuel an interstate natural gas pipeline system. The trial court ruled that the compressor fuel was not subject to the use tax. We affirm.

DISCUSSION

Columbia Gulf Transmission Company (Columbia), a Delaware corporation, filed this lawsuit against Arnold Broussard, the Secretary of the Louisiana Department of Revenue and Taxation (Department), seeking to recoup taxes paid to the State of Louisiana under protest. Columbia paid $1,667,537.23 in use taxes on natural gas used to power four compressor stations located in Louisiana. Columbia filed a motion for summary judgment on the issue of the propriety of the use tax assessment. After the presentation of evidence, the trial court entered judgment in favor of Columbia, awarding it all of the taxes paid in protest, as well as interest and costs. This appeal followed.

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966; **Louisiana National Bank v. Slaughter,** 563 So.2d 445, 447 (La. App. 1st Cir. 1990). The burden is on the mover to show that no genuine issue of material fact exists, and it is only when reasonable minds must inevitably conclude that the mover is entitled to judgment as a matter of law that summary judgment is warranted. Id. In determining whether material issues have been disposed of, any doubt is to be resolved in favor of trial on the merits. If the mover submits sufficient evidence to resolve all issues of material fact, the burden shifts to the opposing party to present evidence that a material fact is still at issue. La. Code Civ. P. art. 967;

Louisiana National Bank v. Slaughter, 563 So.2d at 447-448.

The evidence presented in support of the motion for summary judgment can be summarized as follows: Columbia transports natural gas produced in the Gulf of Mexico, offshore of Louisiana, to regions in the northern United States. After coming out of the wellhead, the natural gas flows directly into Columbia's pipeline which lies at the bottom of the Gulf. That gas, and all other gas Columbia is transporting, flows through the interstate pipeline system until it eventually reaches Kentucky, where the gas is turned over to a Columbia affiliate. Because of a resistance factor which causes the natural gas to lose pressure and slow down on its interstate journey, the natural gas is routed through various compressor stations in different states along the pipeline system, four of which are located in Louisiana. The compressor stations "re-compress" the natural gas flowing in the pipeline, in effect, boosting the pressure of the gas so that it will reach the appropriate flow rate.

The evidence established that at each compressor station, internal combustion engines or turbine engines produce the horsepower necessary to compress the gas to move it through the pipeline system. The compression units are fueled with natural gas that is taken directly from the pipeline. The natural gas is "tapped" off from the main lines, and flows through a filter system to rid it of any debris, to a regulator and measuring system, then directly to the governor of the engine that controls the speed of the engine and the horsepower from the engine. The State sought to impose a use tax on this "compressor fuel" which is burned in the turbines or engines that power the compressor stations.

It is undisputed that all of the gas at issue in this litigation is extracted directly from the interstate pipeline system and is consumed immediately to power the compressor stations in order to propel the balance of the gas stream through and beyond the State of Louisiana. This gas is now owned by Columbia, but rather is supplied to Columbia by agreement between Columbia

and the gas owners. Columbia does not store natural gas in Louisiana to operate its compressor stations.

Columbia argues that the imposition of the use tax is impermissible under the Louisiana taxing statures, as well as the Commerce Clause of the United States Constitution. Because we agree that Louisiana may not statutorily impose a use tax on the gas at issue, we need not address the parties' constitutional arguments.

La. R.S. 47:302 sets forth the general rule that "there is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property..." La. R.S. 47:305 sets forth exclusions and exceptions from the tax provided for in La. R.S. 47:302. La. R.S. 47:305 E(1) states, in pertinent part:

> ...[I]t is not the intention of this Chapter to levy a tax on bona fide interstate commerce...It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

Columbia argues that the compressor fuel is excluded from the imposition of the Louisiana use tax by the express language of La. R.S.47:305 E(1). It asserts that the fuel is extracted from an interstate pipeline system and is used and consumed immediately as an integral part of a purely interstate operation, namely, the continuous, uninterrupted transportation of natural gas from the Gulf of Mexico to the northeast. This flowing compressor fuel is "bona fide interstate commerce" and does not ever "come to rest" in this state, nor does it form a "mass of property in this state".

La. R.S. 47:305 E provides for an exclusion from the use tax.

Tarver v. World Ship Supply, Inc. 615 So.2d 423 (La. App. 4th Cir.), writ denied, 616 So. 2d 672 (La. 1993). An exclusion relates to a transaction which is not taxable because it falls outside of the scope of the statute giving rise to the tax. Transactions excluded from tax are those which by the language of the statutes are defined as beyond the reach of the tax. Id. at 426 (quoting **Oreck, Louisiana Sales & Use Taxation**, §3.1) The exclusionary language makes it clear that the legislature did not intend to subject to a use tax those transactions constituting "bona fide interstate commerce." A use tax may be properly imposed when the property has been withdrawn from interstate commerce and has "come to rest" in this state or has become part of the "mass of property in this state." See **Mouton v. Klatex, Inc.**, 238 So.2d 1 (La. App. 1st Cir.), writ refused, 256 La. 873, 239 So.2d 365 (La. 1970).

The uncontradicted evidence established that the compressor fuel does not "come to rest" in this state, nor does it form a part of the "mass of property in this state." The fuel is diverted from an interstate pipeline system and is consumed immediately as an integral part of the interstate transportation of natural gas. It is therefore beyond the scope of the use tax, and the trial court correctly granted Columbia's motion for summary judgment.

CONCLUSION

Based on the foregoing, the judgment appealed from is affirmed, and consequently, the Department's request for attorney's fees is hereby denied. All costs of this appeal, in the amount of $215.97, are assessed to the Department of Revenue and Taxation.

AFFIRMED.

APPENDIX C

COLUMBIA GULF TRANSMISSION COMPANY	NO. 336, 283 DIVISION "K"
	19TH JUDICIAL DISTRICT COURT
VERSUS	
ARNOLD A. BROUSSARD, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA	PARISH OF EAST BATON ROUGE
	STATE OF LOUISIANA

JUDGMENT

This cause came on for hearing on the renewed motion for summary judgment of Columbia Gulf Transmission Company on April 2, 1993. Present were:

James A. Burton and J. Thomas Hamrick, Jr., attorneys for petitioner, Columbia Gulf Transmission Company ,

and

James C. Russell, Jr., attorney for defendant, Secretary of the Louisiana Department of Revenue and Taxation.

After hearing the evidence and the arguments of counsel, and being of the opinion that the law and the evidence favor petitioner Columbia Gulf Transmission Company, the Court hereby:

ORDERS, ADJUDGES AND DECREES that the motion for

summary judgment of Columbia Gulf Transmission Company be, and the same hereby is, GRANTED, and that judgment be entered in favor of Columbia Gulf Transmission Company and against the Secretary of the Department of Revenue and Taxation of the State of Louisiana in the sum of $1,667,537.23, representing amounts paid under protest through February, 1993, plus additional payments of Louisiana Sales and Use Tax submitted by Columbia Gulf Transmission Company for each month thereafter under protest, and which the parties have agreed and stipulate will be subject to this judgment, plus legal interest on said sums from the respective dates of payment through the date of refund as provided by law.

Judgment read and rendered in open Court in Baton Rouge, Louisiana, this 27th day of April, 1993.

[s]_____
BOB HESTER, DISTRICT JUDGE

Submitted by:

[s]_____
James A. Burton (3708)
J. Thomas Hamrick, Jr. (16957)
SIMON, PERAGINE, SMITH & REDFEARN
1100 Poydras Street, 30th Floor
New Orleans, Louisiana 70163-3000
Telephone: (504) 569-2030

Attorneys for Plaintiff,
Columbia Gulf Transmission Company

Approved as to form:

[s]_____
James C. Russell, Jr. (11066)
330 North Ardenwood
Baton Rouge, Louisiana 70821

Attorney for the Department of
Revenue and Taxation,
State of Louisiana

FILED
APRIL 27, 1993
[s]_____
LINDA AERTKER
DY. CLERK OF COURT

APPENDIX D

Louisiana Revised Statutes, Title 47
§302

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

B. There is hereby levied a tax upon the lease or rental within this state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to the said business.

(2) At the rate of two per centum (2%) of the monthly lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee to the owner of the tangible personal property.

C. There is hereby levied a tax upon all sales of services, as herein defined, in this State, at the rate of two per centum (2%) of the amounts paid or charged for such services.

The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title.

D. Notwithstanding any other provision of law to the contrary, no state sales or use tax nor any such tax levied by a political subdivision shall be levied on any advertising service rendered by an advertising business, including bot not limited to advertising agencies, design firms, and print and broadcast media, or any member, agent, or employee thereof, to any client whether or not such service also involves a transfer to the client of tangible personal property. However, a transfer of mass-produced advertising items by an advertising business which manufactures the items itself to a client for the client's use, which transfer involves the furnishing of minimal services other than manufacturing services by the advertising business shall be a taxable sale or use of tangible personal property; provided that in no event shall tax be levied on charges for creative services which are separately invoiced.

E. No exemption from the state sales and use tax granted after the effective date of this Act and granted pursuant to the provisions of this Chapter or Chapter 2-A of Title 47 of the Louisiana Revised Statutes of 1950 shall be applicable to any sales and use tax levied by any local governmental subdivision or school board unless the state exemption specifically provides that it applies to such sales and use tax levies. In the absence of any such specific

application of the state exemption to sales and use tax levies of any local governmental subdivision or school board, any state exemption granted pursuant to the provisions of this Chapter or Chapter 2-A of Title 47 of the Louisiana Revised Statutes of 1950 shall be applicable only to the levy and collection of the state sales and use tax.

F. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period August 1, 1988 through June 30, 1989, the exemptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*),, (m), (s), (G), 305.1, 305.2, 305.3, 305.8, 305.15, 305.20, 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable and of no effect.

G. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1990 through June 30, 1991, the exemptions to the two percent tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 39:468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s), (G), 47:305.1, 47:305.2, 47:305.3, 47:305.8, 47:305.10, 47:305.14, 47:305.15, 47:305.20, 47:305.37, 47:305.38, 47:305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

H. Notwithstanding any other provisions to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1991 through June 30, 1992, the exemptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s),

(G), 305.1, 305.2, 305.3, 305.8, 305.10, 305.14, 305.15, 305.20, 305.25(A)(1) and (2), 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

I. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1992 through June 30, 1994, the exceptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s), (G), 305.1, 305.2, 305.3, 305.8, 305.10, 305.14, 305.15, 305.20, 305.25(A)(1) and (2), 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

J. Notwithstanding any other provisions of law to the contrary, including the provisions of Subsection I of this Section as proposed by House Bill 568 of the 1992 Regular Session,[1] the provisions of R.S. 47:305(D)(1)(t) shall remain in effect for the period beginning on July 1, 1992 and ending on June 30, 1994.

K. An additional tax shall be levied as follows:

(1) At the rate of four percent of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of four percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

(3) The tax levied under this Subsection shall be in addition to

the tax levied upon such sales under Subsection A of this Section and any other tax levied under other Sections of this Chapter, and shall be subject to the same definitions, exemptions, tax credits, penalties, and limitations now or hereafter prescribed in this Chapter.

(4) The tax levied under this Subsection shall be paid in lieu of any sales or use tax which would otherwise be levied and collected by a local political jurisdiction of this state.

(5) The tax levied under this Subsection shall be levied and collected only from vendors who qualify as a "dealer" in this state solely by virtue of engaging in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio, or television media, including but not limited to television shopping channels, by mail, telegraphy, telephone, computer database, cable, optic, microwave, or other communication system.

(6) The taxes levied under this Subsection shall be collected by the Department of Revenue and Taxation, advised by a sales and use tax commission consisting of seven members appointed as follows: two members appointed by the Louisiana Municipal Association; two members appointed by the Louisiana School Boards Association; two members appointed by the Police Jury Association of Louisiana; and one member appointed by the Louisiana Association of Tax Administrators. The secretary shall assess a collection fee, not to exceed one percent of the proceeds of the tax, as reimbursement for the actual cost of collection of the tax. The department shall keep the commission informed on a regular basis of the collection and distribution of the taxes collected.

(7) Pursuant to an appropriation by the legislature, the secretary shall distribute the proceeds of the tax to the central local sales and use tax collector or, if none, the parish governing authority according to population. The central local sales and use tax collector or the parish governing authority shall at no charge distribute the tax proceeds received from the secretary to each political subdivision within the parish which levies a sales and use tax or receives a portion of the proceeds of a parishwide sales and use tax levy, in accordance with each such political subdivision's pro rata share of local sales and use tax receipts collected on all other transactions subject to local sales and use taxes during the most recent state fiscal year for which data is available within thirty days of receipt of the proceeds.
Added by Acts 1994, No. 18, §1.

L. Notwithstanding any other provision of law to the contrary, including but not limited to any contrary provisions of this Chapter, for the period July 1, 1994 through June 30, 1996, the exceptions to the tax levied pursuant to the provisions of this Section, except for those exemptions provided by R.S. 39:467 and 468, R.S. 47:305(A)(1), (B), (D)(1)(f), (j), (k), (*l*), (m), (s), and (t), and (G), 305.1, 305.2, 305.3, 305.8, 305.10, 305.14, 305.15, 305.20, 305.25(A)(1) and (2), 305.37, 305.38, 305.46, and R.S. 51:1787, shall be inapplicable, inoperable, and of no effect.

(2)

No. 95-53

Supreme Court, U.S.
FILED
JUL 27 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

COLUMBIA GULF TRANSMISSION COMPANY,

Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT G. PUGH
Counsel of Record
ROBERT G. PUGH, JR.
Of the Law Firm of
PUGH, PUGH & PUGH
Commercial National Tower
Suite 2100
333 Texas Street
Shreveport, Louisiana 71101-5302
Telephone: (318) 227-2270
Facsimile: (318) 227-2273

Counsel for the Respondent

July 28, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

5788

QUESTION PRESENTED

Was the decision of the Supreme Court of Louisiana in this case, *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522 (La. 1995), consistent with this Court's holding in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, *reh. den.*, 430 U.S. 976 (1977), and *McNamara v. D. H. Holmes Co., Ltd.*, 505 So.2d 102, *aff'd sub nom. D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988)?

PARTIES

The Petitioner's listing of the parties is correct.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED 5

1. The levy of Louisiana's sales/use tax on compressor fuel is not violative of the Commerce Clause because the four-prong test of *Complete Auto* has been satisfied in these proceedings in that it: 5

   (i) is applied to activity having a substantial nexus with the state 5

   (ii) does not discriminate against interstate commerce 6

   (iii) is fairly apportioned 6

   (iv) is fairly related to benefits that the State provides 7

2. "[This Court] should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified." *Quill Corporation v. North Dakota*, 504 U.S. ___, 119 L.Ed.2d 91, 120, 112 S.Ct. 1904, 1922, (1992) (White, J., concurring in part and dissenting in part) 8

3. Every state court case pertaining to the sales/use taxation of compressor fuel since *Complete Auto* has been decided on the basis of *Complete Auto*'s four prong test 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) 8

Columbia Gulf Transmission Co. v. Broussard, 653 So.2d 522 (La. 1995) ..... *passim*

Columbia Gulf Transmission Company v. Broussard, 637 So.2d 733 (La. Ct. App. 1 Cir. 1994) 4

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, *reh. den.*, 430 U.S. 976 (1977) ..... *passim*

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

D. H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24 (1988) ..... i, 7, 8, 13, 14

Dixie Pipeline Company v. Barry, 227 So.2d 1 (La. App. 3 Cir. 1969), *writ refused*, 229 So.2d 731 (La. 1970) 7

Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980) 8

Goldberg v. Sweet, 488 U.S. 252 (1989) 8

Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 203 (1943) 3

Helson v. Commonwealth of Kentucky, 279 U.S. 245 (1929) ..... *passim*

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 8

TABLE OF AUTHORITIES – Continued

Page

McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944)..... 18

McNamara v. D. H. Holmes Co., Ltd., 505 So.2d 102, *aff'd sub nom. D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988)..... i, 4

Midwestern Gas Transmission Company v. Wisconsin Department of Revenue, 267 N.W.2d 253 (Wis. 1978), *cert. den.*, 439 U.S. 997 (1978).....16, 17

Oklahoma Tax Commission v. Jefferson Lines, ___ U.S. ___, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995).....8, 18

Pledger v. Arkla, 827 S.W.2d 126 (1992) *cert. den. sub nom. Arkla, Inc. v. Pledger*, ___ U.S. ___, 121 L.Ed.2d 144, 113 S.Ct. 203 (1992).....14, 17

Questar Pipeline Company v. Utah State Tax Commission, 817 P.2d 316 (Utah 1991) 14, 17

Quill Corporation v. North Dakota, 504 U.S. ___, 119 L.Ed.2d 91, 112 S.Ct. 1904 (1992)..... 8

Tennessee Gas Pipeline Co. v. Marx, 594 So.2d 615 (Miss. 1992) 14, 17

United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973) 14, 15, 16

Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 8

Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734 (1978)..... 8

UNITED STATES CONSTITUTION

Article 1, § 8, Cl. 3 ("Commerce Clause").....2, 4

TABLE OF AUTHORITIES – Continued

Page

LOUISIANA CITATIONS

LA. R.S. 19:2 7

LA. R.S. 45:251 7

LA. R.S. 47:1576 ..... 3, 6

LA. R.S. 47:302(A)(2) 4, 6

LA. R.S. 47:321(A)(2) 6

BOOKS

Brown, Robert, *The Future of Use Taxes*, 8 *Law and Contemporary Problems* (1941) 10, 12

Hartman, Paul J., *Federal Limitations on State and Local Taxation*, § 10:5 Sales and Use Taxes 10

Hellerstein and Hellerstein, *State Taxation*, ¶ 4.11[1] (1992) 14

Hellerstein and Hellerstein, *State Taxation*, ¶ 18.04[1] (1992) 14, 15, 16

Shepard's Louisiana Case Names Citator, Second Edition 1992, Part 1 7

No. 95-53

In The

Supreme Court of the United States

October Term, 1995

COLUMBIA GULF TRANSMISSION COMPANY,

Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA [hereinafter the "Department"], respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking relief of the Supreme Court of

Louisiana's Opinion in this case. That Opinion is reported at 653 So.2d 522 (La. 1995).[1]

CONSTITUTIONAL PROVISION

Constitutional:

Article 1, § 8, Cl. 3. Powers of Congress. The Congress shall have power . . .

(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

STATEMENT OF THE CASE

The facts, as stated by Petitioner, COLUMBIA GULF TRANSMISSION COMPANY [hereinafter "Columbia Gulf"], are substantially correct.

---

[1] The Supreme Court of Louisiana reversed a Summary Judgment in favor of Columbia Gulf Transmission Company and remanded the case to the Louisiana trial court for further proceedings. *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d 522, 525 (La. 1995). No action has, as yet, taken place in the Louisiana trial court; however, the federal issue presented here is conclusive, and the outcome of further proceedings is preordained because the Louisiana state case is, for all practical purposes, concluded. The Judgment of the Supreme Court of Louisiana on the federal issue should be deemed final. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

Issue was joined on the singular allegation that:

> The sales/use taxes herein protested were imposed upon compressor fuel utilized to transport natural gas in continuous flow in interstate commerce and is an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3.

Columbia Gulf's Original Petition Paragraph 5.

No Louisiana statutes were initially drawn in question except Columbia Gulf's right under LA. R.S. 47:1576 to pay Columbia Gulf's taxes under protest, which right was certainly not contested by the State of Louisiana. Louisiana's procedure in this regard has been affirmatively approved by this Court in *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 203 (1943).

The Louisiana trial court granted a Motion for Summary Judgment.[2] Since the Louisiana trial court failed to give written reasons for its granting of a Summary Judgment, the issue as presented, by the Department, to the Louisiana intermediate appellate court was:

---

[2] Columbia Gulf has stated in its Petition, Page 5, that no written reasons were assigned; however, there were Oral Reasons for Judgment in the Record.

BY THE COURT:

> THE EASIEST THING TO DO TO LOOK LIKE THE GOOD GUY IS TO SAY DENIED BECAUSE THE STATE OF LOUISIANA NEEDS 1.8 MILLION DOLLARS, AND I'M WELL AWARE OF THAT. AND I COULD LET THE COURT OF APPEALS BE THE BAD GUYS. BUT THAT'S NOT WHAT I'M PAID TO DO. I'M PAID TO TAKE THE HEAT, AND I'M GOING TO. YOUR MOTION IS GRANTED.

> Whether the provisions of the Louisiana sales/use tax law, LA. R.S. 47:302 are violative of the Commerce Clause Article 1, Section 8, Clause 3 of the Constitution of the United States, as applied by assessing a sales/use tax against appellee, COLUMBIA GULF TRANSMISSION COMPANY, on the natural gas used by COLUMBIA GULF TRANSMISSION COMPANY and consumed as fuel in the four compressors owned by COLUMBIA GULF TRANSMISSION COMPANY and located within the State of Louisiana.

On appeal, the Louisiana intermediate appellate court concluded that the compressor fuel, as consumed in the re-compressing process, never comes to rest under Louisiana law and, therefore, is not subject to taxation. While so holding, the Louisiana intermediate appellate court failed to address the federal constitutional issues.

> Because we agree that Louisiana may not statutorily impose a use tax on the gas at issue, we need not address the parties' constitutional arguments.

Columbia Gulf Transmission Company v. Broussard, 637 So.2d 733, 735 (La. Ct. App. 1 Cir. 1994).

The Supreme Court of Louisiana granted a Writ of Certiorari to consider a possible conflict with *McNamara v. D. H. Holmes Co., Ltd.*, 505 So.2d 102, *aff'd sub nom. D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988). The Supreme Court of Louisiana determined that: (i) a taxable incident occurred upon the consumption of the compressor gas, (ii) *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929) had been superseded by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, *reh. den.*, 430 U.S. 976

(1977), and (iii) the four-prong *Complete Auto* test had been successfully satisfied. *Columbia Gulf Transmission Co. v. Broussard*, 653 So.2d at 524 (La. 1995).

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1.

The Levy Of Louisiana's Sales/Use Tax On Compressor Fuel Is Not Violative Of The Commerce Clause Because The Four-Prong Test of *Complete Auto* Has Been Satisfied In These Proceedings In That It:

(i) Is applied to activity having a substantial nexus with the state –

Columbia Gulf has hundreds of miles of pipeline traversing the State of Louisiana from east to west, west to east, and south to northwest. Along this pipeline there exists four compressor stations. Columbia Gulf does sufficient business within Louisiana that it must pay Louisiana Sales Tax, Louisiana Corporate Income Tax, Louisiana Unemployment Tax and Louisiana Ad Valorem Property Tax. In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> Columbia's gas production has a substantial nexus with the State of Louisiana. Columbia's pipeline and four compressor stations carry natural gas from offshore Louisiana to the state's borders. Columbia pays Louisiana taxes on its employees and activity in the state.

653 So.2d at 524.

(ii) does not discriminate against interstate commerce –

The Louisiana sales/use tax is evenly applied as between intrastate pipelines and interstate pipelines which fuel their compressors with natural gas. These are tax neutral. In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> There is no discrimination against interstate commerce. The tax is applied equally to intrastate and interstate pipelines. Gas in interstate commerce is taxed equally with intrastate gas when both are consumed within the state.

653 So.2d at 524.

(iii) is fairly apportioned –

The sales/use tax imposed is based only on gas actually consumed in the compressor stations located in Louisiana. The amount of natural gas used as fuel for the compressors is a known quantity. Its measurement is reflected in the amount of sales/use tax which has been escrowed under protest pursuant to LA. R.S. 47:1576. Since the natural gas is measured when it is removed for fuel and consumed, no other state can seek to tax this natural gas consumed by the compressor stations located in Louisiana. Even if another State attempted to tax such gas, which does not occur, a credit would be allowed. LA. R.S. 47:302(A)(2), 47:321(A)(2). In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> This tax is fairly apportioned because it is imposed only on gas actually consumed in Louisiana's compressor stations.

653 So.2d at 524.

(iv) is fairly related to benefits that the State provides –

By paying Louisiana Unemployment Tax, Columbia Gulf has employees who enjoy the benefits provided in Louisiana of roads, schools, fire and police protection, and all of the other advantages of a civilized society. Significantly, Columbia Gulf has what few corporations share, the right to take from Louisiana's persons, by way of expropriation, the private property of such persons. *See* LA. R.S. 19:2, LA. R.S. 45:251 and *Dixie Pipeline Company v. Barry*, 227 So.2d 1 (La. App. 3 Cir. 1969), *writ refused*, 229 So.2d 731 (La. 1970). Columbia Gulf has exercised this right with some degree of regularity. *See Shepard's Louisiana Case Names Citator*, Second Edition 1992, Part 1. In concluding that this prong of the test had been met, the Supreme Court of Louisiana held:

> The gas is measured as it is removed and consumed. No other state can tax the same gas. The tax is fairly related to benefits provided by Louisiana. Columbia's employees enjoy Louisiana's roads, schools, fire and police protection. Columbia has the right to expropriate Louisiana private property. LSA-R.S. 19:2(5). Columbia's compressor fuel is fairly taxed because of the company's "significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." *D. H. Holmes*

Co., Ltd. v. McNamara, 486 U.S. 24, 33, 108 S.Ct. 1619, 1624, 100 L.Ed.2d 21, 29 (1988).

653 So.2d at 524.

A long line of cases decided since *Complete Auto* has recognized that the four factors identified in *Complete Auto* constitute the proper test for determining whether a state tax on intrastate commercial activities violates the Commerce Clause's prohibition on the States' interference with the free flow of interstate trade. *See e.g., Oklahoma Tax Commission v. Jefferson Lines*, ___ U.S. ___, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995); *Goldberg v. Sweet*, 488 U.S. 252 (1989); *D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24 (1988); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978).

2.

"[This Court] should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified." *Quill Corporation v. North Dakota*, 504 U.S. ___, 119 L.Ed.2d 91, 120, 112 S.Ct. 1904, 1922, (1992) (White, J., concurring in part and dissenting in part)

The prominent authors who have considered the question are uniformly of the opinion that the case of *Helson v. Commonwealth of Kentucky*, 279 U.S. 245 (1929),

has, in the words of the Supreme Court of Louisiana, been superseded by *Complete Auto.*

> The commerce clause obstruction to state taxation erected in *Helson* apparently has been removed by *Complete Auto Transit, Inc. v. Brady. Helson* condemned the use tax there imposed on the consumption of gasoline to provide motive power for a vehicle by which interstate commerce was carried on in the taxing State. Taxpayer operated a ferry boat engaged in interstate commerce within the taxing State. The tax was constitutionally stigmatized as the "price of the privilege of using an instrumentality of interstate commerce." Under *Auto Transit,* a tax imposed upon the privilege of engaging in interstate commerce is no longer *per se* invalid. Additionally, the four *Auto Transit* safeguards that must be satisfied before interstate commerce can be taxed all appear to be met in *Helson.* First, there is the *Auto Transit* requirement that there must be a sufficient nexus of the taxing State with the activity taxed. The *Helson* tax is not wanting in this requirement. Seventy-five per cent of the distance traveled by the *Helson* interstate ferry was within the taxing State, and the tax was measured only by the amount of the gasoline consumed within the State. Thus, satisfied, too, is the second *Auto Transit* standard, which requires that the tax be fairly apportioned. In *Helson,* the State imposed the tax only on that part of the gasoline consumed by the ferry boat operating within the State. A fairer apportionment is difficult to imagine. Neither did *Helson* violate the *Auto Transit* standard that the tax must not discriminate against interstate commerce. There is no evidence of such discrimination in *Helson. Auto*

> *Transit* also requires that the taxed activity be fairly related to the services provided by the taxing State. In *Helson*, the State only taxed that gasoline consumed by the ferry boat operating within the taxing State, which provided benefits and protection to the ferry boat operating within her borders.
>
> It is doubtful that *Helson* any longer has any vitality as a legal precedent.

Hartman, Paul J., *Federal Limitations on State and Local Taxation*, § 10:5 Sales and Use Taxes, pp. 602-603 (1981).

Robert C. Brown was a Professor of Law at Indiana University when he authored *The Future of Use Taxes*. Professor Brown's discussion concerning *Helson* is entitled "The Doctrine of The *Helson* Case."

> The Doctrine of the *Helson* case
>
> Apart from possible indirect effects of the use tax upon interstate commerce, which will be hereafter considered, the most serious judicial limitation of the use tax is embodied in the decision of the Federal Supreme Court in *Helson v. Kentucky*. Here a Kentucky sales tax had been construed by the courts of that state as a use tax where the purchase was made outside the state. The *Helson* case held the tax unconstitutional as a direct burden on interstate commerce when applied to gasoline purchased in Illinois and used for the operation of an interstate ferry (from Illinois to Kentucky), and though concededly 75 per cent of the gasoline was actually used in Kentucky.

This decision, twelve years old and consequently rather ancient as such matters go, is on principle perhaps justifiable on the ground of lack of proper apportionment, though the opinion of the Court, written by Mr. Justice Sutherland, does not make any point of this. It was substantially a five to four decision, since Mr. Justice Stone (Justices Holmes and Brandeis concurring with him) agreed under protest, and only because of prior decisions of the Court. Curiously enough, the one complete dissenter was Mr. Justice McReynolds, who, however, wrote no opinion.

The *Helson* case, if still a binding authority, is a rather serious check upon use taxes with respect to actual facilities of interstate commerce. Its doctrine is still followed to the extent that a strict use tax with respect to gasoline or other commodity actually used as a facility of interstate commerce must be reasonably apportioned to the actual use in the state. But otherwise the authority of the *Helson* case is today very doubtful. It is clear, for instance, that the doctrine of the case does not apply where the article taxed is used wholly within the state, even though imported from outside. Neither does it apply where gasoline is purchased in the state even though it is used wholly in operating airplanes in interstate commerce, and this despite the fact that here there is no use of the roads to justify the tax on that basis.

The loophole opened by the last-cited case was soon enlarged by two other decisions. In the first of these, a Tennessee tax on the storage of gasoline within the state was upheld, even though the taxpayer was an interstate railroad

and so would not use the roads on which this revenue was applied, and even though substantially all the gasoline would be used in interstate commerce. The Court distinguished the *Helson* case on its facts, but showed obvious disapproval of it. A similar doctrine was applied in the other case, which involved air transportation, the state tax on the storage of gasoline being upheld even though the gasoline was bought outside the state. The *Helson* case was distinguished in that here the tax was on storage within the state and not on interstate flying. It seems that this distinction, while perhaps technically justifiable, is practicably unsubstantial.

The Supreme Court itself has recognized that there is little left of the *Helson* case; that the distinctions which it has thus made are so narrow as to be almost nonexistent. It thus seems that the opinion expressed by a number of commentators, that the *Helson* case is substantially overruled, is correct. At least it is no longer a substantial restriction upon the taxing power of the states. Furthermore, the old doctrine, or whatever is left of it, has no effect whatsoever upon the much more important application of the use tax to goods within the state for other purposes than as a facility of commerce. Obviously such use has no direct effect upon interstate commerce, though, as will presently appear, there may be indirect effects which have to be considered. The point is that the *Helson* doctrine is substantially out, and needs no further consideration.

Brown, Robert, *The Future of Use Taxes* , 8 *Law and Contemporary Problems* pp. 495, 496 (1941).

The two volume treatise on state taxation by Jerome R. Hellerstein and his son, Walter Hellerstein covers, in Volume I Corporate Income and Franchise Taxes, and in Volume II Sales and Use, Personal Income, Death and Gift Taxes. Their discussion concerning the *Helson* case states:

> Use Tax on Goods Allegedly in Stream of Interstate Commerce
>
> In *DH Holmes Co. v. McNamara,* [Footnote 245: DH Holmes Co. v. McNamara, 486 U.S.24, 108 S.Ct. 1619 (1988)] the Supreme Court considered the question of whether the Commerce Clause forbade Louisiana from imposing a use tax on catalogs shipped from outside the State directly to the taxpayer's customers in Louisiana. The taxpayer, Holmes, was a Louisiana corporation with thirteen department stores and approximately 1,500,000 customers throughout the State. Holmes argued that Louisiana could not impose the tax on Holmes' use of the catalogs because they were still in the stream of commerce when the tax attached. The Supreme Court found that this contention was beside the point. Declaring that it had abandoned the "abstract notion that interstate commerce 'itself' cannot be taxed by the States" in *Complete Auto Transit, Inc. v. Brady,* the court held:
>
> > Accordingly, in the present case it really makes little difference for Commerce Clause purposes whether appellant's catalogs "came to rest" in the mailboxes of its Louisiana customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some

> importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred [under State law]), but for Commerce Clause analysis it is largely irrelevant. [Footnote 248: DH Holmes Co. v. McNamara, supra note 245, 486 US at 31, 108 S.Ct. at 1623. . . . The *DH Holmes* case is considered in more detail in ¶ 16.03[3][a][ii]. See also Pledger v. Arkla, Inc. 309 Ark. 10, 827 SW2d 126 (1992)) [*cert. denied*, ___ US ___, 113 S.Ct. 203 (1992) 1993 Supplement], Tennessee Gas Pipeline Co. v. Marx, 594 So.2d 615 (Miss. 1992, and Questar Pipeline Co. v. Utah State Tax Comm'n, 817 P2d 316 (Utah 1991), all of which relied on the *D.H. Holmes* case in sustaining State use taxes on compressor fuel used to propel natural gas through interstate pipelines. In light of *D.H. Holmes*, and the cases construing it, one may question the continuing validity of Helson & Randolph v. Kentucky, 279 US 245, 49 S.Ct. 279 (1929), which held that a tax on the mere consumption of fuel in the State by an instrumentality of interstate commerce violated the Commerce Clause because there was no "taxable moment." Cf. United Air Lines, Inc. v. Mahin, 410 US 623, 93 S.Ct. 1186 (1973) (sustaining State tax on storage of fuel consumed on interstate flights and narrowly distinguishing *Helson & Randolph*).]

Hellerstein and Hellerstein, *State Taxation*, ¶ 4.11[1] pp.4.60-4.61 (1992).

Hellerstein and Hellerstein also discussed the *Helson* case in ¶ 18.04[1] of their treatise:

> In the other case cited in the *United Air Lines*[3] case, Helson v. Commonwealth of Ky., 279 US 245, 49 S.Ct. 279 (1929), a Kentucky tax on gasoline loaded onto a ferry in Illinois and consumed in the course of the ferry's trip to Kentucky, was invalidated. The court distinguished *Helson* in the later *Edelman* case on the ground that the taxable event in *Helson* was the consumption of the fuel, not the storage. Storage in the taxing State was found to be the taxable event in *Edelman* in which the levy was upheld. This is a very narrow distinction that is by no means free from doubt. Fortunately, such nice distinctions are no longer decisive in Commerce Clause adjudication since the *Complete Auto Transit* decision. See supra note 57 [[57] Complete Auto Transit, Inc. v. Brady, 430 US 274, 97 S.Ct. 1076 (1977)].

Hellerstein and Hellerstein, *State Taxation*, ¶ 18.04[1] pp. 18.15-18.16, fn. 67 (1992).

> Decisions such as *United Air Lines* that sustained State use taxes under the traditional Commerce Clause doctrine remain good law, but the supporting rhetoric has changed. Although some State courts have been lamentably slow to adapt their decisions to the Supreme Court's current Commerce Clause views, [Footnote 71 . . . The Wisconsin Supreme Court in 1978 struck down a sales and use tax on natural gas used in pumping facilities of an interstate pipeline. The pumps in question were located entirely in the State, and the natural gas was consumed at two compressor stations in the

---

[3] *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973).

> State. Midwestern Gas Transmission Co. v. Wisconsin Dep't of Revenue, 84 Wis. 2d 261, 267 NW2d 253 (1978). The court relied on the 1929 decision in Helson & Randolph v. Kentucky, 279 US 245, 49 S.Ct. 279 (1929), in which a Kentucky tax on a ferry boat's use of gasoline, only 75 percent of which was consumed in the State, was struck down under the Commerce Clause. Although the Wisconsin court discussed both the *United Air Lines* (supra note 66) and *Complete Auto Transit* (supra note 57) cases, it concluded – it is believed erroneously – that the Wisconsin tax had not been validated by those cases. . . . Unfortunately, some commentators have also failed to accommodate their writing to the current Supreme Court decision. See Tatarowicz & Swails, "Avoiding Use Tax on Interstate Transportation Equipment," 3 Interstate Tax Rep. Vol. 12, at 1 (1984), in which the intrastate "taxable moment" test is treated as the prevailing Commerce Clause doctrine; Nackenson-Sheiber, "States Narrow Exemption for Instrumentalities of Interstate Commerce," 7 Interstate Tax Rep. No. 1 (1988). For other writings analyzing the recent Supreme Court decisions, see Kaufman and the author W. Hellerstein's, "Sales and Use Taxation of Movable Property in Interstate Commerce," 1981 NTA-TIAA Procs. 69, 71; Dane, "Movable Property in Interstate Commerce: How It Is Subject to Sales and Use Taxes," 48 J. of Tax'n 176 (Mar. 1978); . . .] the courts need no longer search for an intrastate taxable incident that is distinct from interstate commerce in order to uphold a tax under the Commerce Clause.

Hellerstein and Hellerstein, *State Taxation*, ¶ 18.04[1] p. 18.17, fn. 71 (1992).

3.

Every state court case pertaining to the sales/use taxation of compressor fuel since *Complete Auto* has been decided on the basis of *Complete Auto*'s four prong test.

This is the fifth state court case since *Complete Auto* concerning the same issue, i.e., a tax levied on compressor fuel. In each instance, the respective state Supreme Courts decided their case by the application of the four prong *Complete Auto* test.

The first of these five cases, *Midwestern Gas Transmission Company v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), after discussing the four prong criteria of *Complete Auto*, concluded that the first point "nexus" was absent, based upon the continuing relevence of *Helson*. This Court denied certiorari in the *Midwestern* case, 439 U.S. 997 (1978).

Although the taxpayer won the first post *Complete Auto* compressor fuel case, the taxpayer lost the next three state compressor fuel cases. *Questar Pipeline Company v. Utah State Tax Commission*, 817 P.2d 316 (Utah 1991), *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992), and *Pledger v. Arkla*, 827 S.W.2d 126 (1992). A Petition for Certiorari in the last case was denied. *Arkla, Inc. v. Pledger*, ___ U.S. ___, 121 L.Ed.2d 144, 113 S.Ct. 203 (1992).

Each of these three cases was decided by the application of the four prong test of *Complete Auto*, coupled with the *D. H. Holmes* holding by this Court that "[a]ccordingly, in the present case it really makes little difference for Commerce Clause purposes whether appellant's catalogs "came to rest" in the mailboxes of its Louisiana

customers or whether they were still considered in the stream of interstate commerce. This distinction may be of some importance for other purposes (in determining, for instance, whether a "taxable moment" has occurred [under State law]), but for Commerce Clause analysis it is largely irrelevant."

The present case is the last of the five state cases since *Complete Auto*. **The Reasons For Granting The Writ** as set forth at Pages 3 to Page 19 of the Petition as filed in this case are precisely the same as set forth in the *Arkla* petition at pages 6 to 20.[4] Every argument advanced in this petition has heretofore been entertained and considered three years ago by this Court in the *Arkla* case. A parallel presentation of the relevant portion of the present case and the *Arkla* case is set forth in the Appendix to this Opposition.

---

[4] With, however, the singular exception of a citation at Page 18 of the petition here to the *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, 131 L.Ed.2d 261, 115 S.Ct. 1331 (1995) case and a section at pages 21-27 of the *Arkla* petition concerning the *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari as filed by Columbia Gulf Transmission Company should be denied.

All of the above and foregoing is thus respectfully submitted.

ROBERT G. PUGH
Counsel of Record
ROBERT G. PUGH, JR.
Of the Law Firm of
PUGH, PUGH & PUGH
Commercial National Tower
Suite 2100
333 Texas Street
Shreveport, Louisiana 71101-5302
Telephone: (318) 227-2270
Facsimile: (318) 227-2273

Counsel for the Respondent

APPENDIX

As shown in the Appendix, this Court has heretofore entertained, considered and rejected a *Petition for a Writ of Certiorari to the Supreme Court of Arkansas* containing the same issues and, for all intents and purposes, virtually the same wording as presented in this petition. The Arkansas petition, as filed, is entitled *Arkla, Inc., Petitioner v. James C. Pledger, Director, Department of Finance and Administration, State of Arkansas, Respondent*, No. 92-218 in the Supreme Court of the United States October Term, 1992. The writ was denied on October 5, 1992, *Arkla, Inc. v. Pledger*, 121 L.Ed.2d 144, 113 S.Ct. 203, 61 U.S.L.W. 3218 (1992).

The following Appendix pages demonstrate that the petitions are almost indistinguishable. The Appendix pages place the present case on the left side while the *Arkla* case is placed on the right side. [The footnotes and the page numbers are, however, omitted.]

Columbia Gulf No. 95-53

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its use tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, a portion of a natural gas stream which is clearly being transported in interstate commerce is consumed, without ever coming to rest in Louisiana, in order to provide the energy necessary to move the remainder of the commingled natural gas stream onward in its uninterrupted interstate journey. The State of Louisiana, by executive fiat and now with the approval of its Supreme Court, has imposed its use tax directly upon the value of that portion of the natural gas stream so consumed. This Court has never authorized nor permitted the imposition of a use tax directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sale or use tax has become a part of the mass of the physical property of the taxing state.

Arkla No. 92-218

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its sales tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, natural gas which is clearly being transported in interstate commerce (and which is generally purchased out-of-state) is consumed wholly within that stream of interstate commerce (before it ever comes to rest in Arkansas) to provide energy to drive the movement of the remaining natural gas in interstate commerce. The State of Arkansas, with the approval of its Supreme Court, has imposed a sales tax directly upon the value of the natural gas consumed within that stream of interstate commerce. This Court has never authorized nor permitted the imposition of a sales tax, or even a use tax, directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sales or use tax has become a part of the mass of the physical properties of the imposing state.

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. The prohibition established by this Court in *Helson* has never been overruled. The majority opinion of the Supreme Court of Louisiana failed to follow this principle; indeed, that court mistakenly referred to *Helson* as having been "superseded."

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state use tax directly upon fuel consumed in the stream of interstate commerce. While the decision of the Supreme Court of Louisiana below is in accord with recent decisions of the highest courts of Arkansas,[5] Mississippi[6] and Utah,[7] it is diametrically opposed to decisions of the highest courts of Wisconsin[8] and Tennessee[9] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts, and now that of Louisiana, totally disregarded this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the rule of *Helson* was the controlling law in this factual situation.

Arkla No. 92-218

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S.Ct. 279 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. This **bright-line** rule established by this Court in *Helson* has never been overruled, and the Petitioner submits it is the controlling law, under the Commerce Clause, on the issue presented. The Arkansas Supreme Court's majority opinion failed to even recognize, or discuss, the *Helson* case, even though the Petitioner fully briefed this issue, and made it the main subject of its petition for rehearing, in the court below.

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state excise tax directly upon articles while in the flow of interstate commerce. While the decision of the Arkansas Supreme Court below is in accord with the very recent decisions of the Supreme Courts of Mississippi[3] and Utah,[4] it is diametrically opposed to the long-standing decisions of the Supreme Courts of Wisconsin[5] and Tennessee[6] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts totally ignored this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the bright-line rule of *Helson* was the controlling law in this factual situation.

* * *

[There follows discussion on both the cases of *Helson & Randolph v. Kentucky*, 279 U.S. 577 (1929) and *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944)]

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict of opinion between decisions of this Court and the Supreme Court of Louisiana, and between the highest courts of several states. These conflicts can only be resolved by this Court. The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions.** Are the decisions of the Supreme Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, and now Louisiana, correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? (Addressed in Section A below.)

2. **Controlling Decision.** Has the decision in *Helson,* which was subsequently cited with approval by this Court in 1973 and 1981, been superseded by the decision in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, *reh. den.*, 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977), such that *Helson* is no longer the controlling authority on this issue? (Addressed in Section B below.)

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict of opinion between decisions of this Court and the Arkansas Supreme Court, and between the Supreme Courts of the states. These conflicts can only be resolved by this Court. This case also presents a growing controversy between the states and the operators of interstate pipelines. This constitutional issue is obviously of extreme importance to the industry as well as the states, as reflected by the fact that three decisions of state supreme courts have been rendered within the last year regarding the taxation of such compressor fuel.[7] The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions.** Are the decisions of the Supreme Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? [Addressed in Section I, A., below.]

2. **Controlling Decision.** Has the decision in *Helson*, which was subsequently cited with approval by this Court in 1973 and 1981, been overruled or modified by the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed. 326, 97 S.Ct. 1076 (1977), such that *Helson* is no longer the controlling authority on this issue? [Addressed in Section I, B., below.]

Columbia Gulf No. 95-53

LOUISIANA CANNOT IMPOSE ITS USE TAX DIRECTLY UPON AN ARTICLE WHICH IS CONSUMED WHILE IN THE FLOW OF INTERSTATE COMMERCE, WITHOUT EVER COMING TO REST WITHIN THE STATE OF LOUISIANA

A. Conflicts Among the Highest Courts of the Several States.

The first judicial resolution of this particular issue, i.e., the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. *Texas Gas Transmission Corp. v. Benson, supra,* note 9, involved both a factual situation and a state taxing statute essentially identical to those at issue here. In that case, the Tennessee Supreme Court stated:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. *It is, therefore, a necessary and integral part of the interstate operation.*
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.

I. ARKANSAS CANNOT IMPOSE ITS SALES TAX DIRECTLY UPON AN ARTICLE WHILE IN THE FLOW OF INTERSTATE COMMERCE, WHEN THAT ARTICLE IS CONSUMED WHILE STILL IN THE FLOW OF INTERSTATE COMMERCE, BEFORE IT COMES TO REST WITHIN THE STATE OF ARKANSAS; *HELSON & RANDOLPH v. KENTUCKY.*

A. Conflicts Among the Supreme Courts of the Several States.

The first judicial resolution of this particular issue, *i.e.*, the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. In *Texas Gas Transmission Corp. v. Benson, supra,* note 6, the Tennessee Supreme Court pronounced:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. It is, therefore, a necessary and integral part of the interstate operation.
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.

> *Moreover, we agree with the Chancellor the case of Helson v. Commonwealth of Kentucky, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), is controlling.*

444 S.W.2d 137, 139 (emphasis added).

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State,* 227 N.W.2d 334 (Mich. App., Div. 2, 1975):

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson,* supra. The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly the same purpose. In either case, the tax is upon the instrument of commerce.

227 N.W.2d 334, 336.

The Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

> **Moreover, we agree with the Chancellor the case of *Helson v. Commonwealth of Kentucky,* 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929), is controlling.** (Emphasis supplied). 444 S.W.2d 137, 139.

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State,* 227 N.W.2d 334 (Mich. App. Div. 2, 1975), holding, in a final decision of the courts of that state, that:

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson, supra.* The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly the same purpose. In either case, the tax is upon the instrument of commerce. 227 N.W.2d 334, 336.

This Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

In 1978, one year after this Court's decision in *Complete Auto Transit, Inc. v. Brady, supra,* the Supreme Court of Wisconsin reached a similar conclusion in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue, supra,* note 8. In that case, the court largely followed *Helson, Texas Gas* and *Michigan Wisconsin Pipe Line Company.* It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. This Court denied certiorari.

Thus, the decision of the Supreme Court of Louisiana in these proceedings, as well as the decisions of the Supreme Courts of Arkansas, Mississippi and Utah, are indirect, irreconcilable conflict with the foregoing decisions of the Supreme Courts of Tennessee and Wisconsin and the appellate court of Michigan on this important federal question involving the state taxation of interstate commerce.

In 1978, the Supreme Court of Wisconsin reached a similar decision in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue, supra,* note 5. In that case, the court largely followed *Helson, Texas Gas* and *Michigan Wisconsin Pipe Line Company.* However, the *Midwestern Gas* case was decided after this Court's decision in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. The application for certiorari with respect to the decision in *Midwestern Gas* was denied by this Court.

Thus, the decision of the Supreme Court of Arkansas in these proceedings, as well as the decisions of the Supreme Courts of Mississippi and Utah, are in direct, irreconcilable conflict with the above referenced decisions of the Supreme Courts of Tennessee and Wisconsin on this important federal question involving the state taxation of interstate commerce.

B. *Helson* Remains the Controlling Authority.

In *Helson,* Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the border of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed in that state to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is a little more than repetitious to say that such a tax cannot be laid upon *the use of a medium by which such transportation is effected.*

279 U.S. 245, 252; 49 S. Ct. 279, 281; 73 L. Ed. 683, 687.

B. *Helson* Remains the Controlling Authority.

In *Helson,* Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the borders of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetitious to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 279 U.S. 245, 252; 73 L.Ed. 683, 687.

Columbia Gulf No. 95-53

The undisputed facts established in this case are even stronger for the legal proposition advanced by Columbia Gulf here, than were the facts in *Helson*. Here, the compressor fuel is an indistinguishable part of the continuously moving, commingled stream of natural gas in question – the very "cargo" being transported in interstate commerce. The use tax which Louisiana seeks to impose in this case is being imposed not only on the *instrumentalities* of interstate commerce such as fuel, but directly upon the value of a part of the commodity – the compressor fuel – which itself is being transported in interstate commerce.

More recently, in *Commonwealth Edison, supra* at 12, this Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or intrastate in character. In that decision, which cited *Helson*, this Court at least tacitly indicated the continued validity of *Helson*:

> In this regard, the Montana court relied on this Court's decision in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237, (1922), *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S. Ct. 526, 67 L. Ed. 929 (1923), and *Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.

The undisputed facts established in this case are even stronger for the legal proposition advocated by Arkla than were the facts in *Helson*. Here, the natural gas in question is itself the "cargo" being transported in interstate commerce, not just the fuel for the ferry boat, *i.e.*, the instrumentality of interstate commerce. The sales tax which Arkansas seeks to impose in this case is not being imposed just on the instrumentalities of interstate commerce and its fuel, but here the sales tax is imposed directly upon the value of the commodity being transported in interstate commerce itself, before such commodity ever passes through the meters at the "city gates" of the Company's distribution systems. Only after such metering, is this natural gas removed from the flow of interstate commerce, and therefore becomes a part of the mass of property within that state, subject to regulation by the APSC.

In *Commonwealth Edison*, the Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or of intrastate type activity. In that decision, which cited *Helson*, this Court clearly indicated that *Helson* was not incorrectly decided. Specifically, this Court stated:

> In this regard, the Montana court relied on this Court's decision in *Heisler v. Thomas Colliery Co.*, 260 US 245, 67 L Ed 237, 43 S Ct 83 (1922), *Oliver Iron Mining Co. v Lord*, 262 US 172, 67 L Ed 929, 43 S Ct 526 (1923), and *Hope Natural Gas Co. v. Hall*, 274 US 284, 71 L Ed 1049, 47 S Ct 639 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.

* * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., *Helson & Randolph v. Kentucky*, 279 U.S. 245, 250-252, 49 S. Ct. 279, 280-81, 73 L. Ed. 683 (1929); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 562, 45 S. Ct. 184, 185, 69 L. Ed. 439 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved.

453 U.S. 609, 614-15 and 617; 101 S. Ct. 2946, 2951-2953; 69 L. Ed. 2d 884, 892 and 894. But the Court made clear in a following footnote: *

* * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., ***Helson & Randolph v Kentucky,*** 279 US 245, 250-252, 73 L Ed 783, 49 S Ct 279 (1929); *Ozark Pipe Line Corp. v Monier,* 266 US 555, 562, 69 L Ed 439, 45 S Ct 184 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attached only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved. (Emphasis supplied.) 453 U.S. 609, 614-15 and 617; 69 L.Ed.2d 884, 892 and 894.

This final statement of the Court is followed by a reference to footnote 7, in which this Court expressly provided:

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided.**

(emphasis supplied.) 453 U.S. 609, 617; 101 S. Ct. 2946, 2953; 69 L. Ed. 2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 93 S. Ct. 1186, 35 L. Ed. 2d 545 (1973), noted the continuing validity of the *Helson* rationale:

> We hold that *Edelman [v. Boeing Air Transport, Inc.*, 283 U.S. 249, 53 S. Ct. 591, 7 L. Ed. 1155 (1933)] and *Nashville [Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1993)] support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided.**

(Emphasis supplied.) 453 U.S. 609, 617; 69 L.Ed.2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545, 93 S.Ct. 1186 (1973), noted the continuing validity of the *Helson* rationale. In *United Air Lines* this Court stated:

> We hold that *Edelman* and *Nashville* support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.

> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954), nor by the State in which it is merely consumed, under *Helson*. (Emphasis supplied.) 410 U.S. 623, 629-30; 93 S. Ct. 1186, 35 L. Ed. 2d 545, 552-53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. **Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it was transported, under *Michigan-Wisconsin Pipe Line Co. v Calvert*, 347 US 157, 98 L Ed 583, 74 S Ct 396 (1954), nor by the State in which it is merely consumed, under *Helson*.** (Emphasis supplied.) 410 U.S. 623, 629-30; 35 L.Ed.2d 545, 552-53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

The Supreme Court of Louisiana ignored *Helson*, and treated that precedent as if it did not exist. Thus, under the decision of the Supreme Court of Louisiana, the value of the fuel for boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Louisiana, but while within the confines of interstate commerce, may be directly subjected to Louisiana's use tax, subject only to the limitations announced by this Court in *Complete Auto Transit.*

From this Court's decisions there have evolved certain restrictions (and liberties) on the states' powers to impose their taxes upon entities engaged in interstate commerce. Although this Court's decision in *Complete Auto Transit* (1977) did away with the rule announced in *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951) – that no direct tax could be imposed upon interstate commerce or the privilege of doing interstate business – Columbia Gulf submits that both *Spector* and *Complete Auto Transit* addressed indirect taxes on the privilege of doing interstate business. While there has certainly been an expansion of the concept announced in *Complete Auto Transit,* and this Court has consistently held that interstate commerce may be obliged to bear its fair share of the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of a portion of a commodity during its interstate journey, with which it is indistinguishably commingled and from which it is extracted solely for the purpose of propelling the commodity.

Arkla No. 92-218

The Arkansas Supreme Court totally ignored this Court's "bright-line" rule announced in *Helson* and treated that precedent as if it did not exist. For this Court to ignore this denigration of the principle of *stare decisis* by this state supreme court will leave the door completely open for all states to seek to tax all fuels consumed within the confines of interstate commerce, but within that state, to power the instrumentalities of interstate commerce. Thus, under the Arkansas Supreme Court's decision here, the value of the fuel of boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Arkansas, but while within the confines of interstate commerce, may be directly subjected to Arkansas' sales tax, subject only to the limitations announced by this Court in *Complete Auto Transit.*

This Court's decisions have formed an evolution of the Commerce Clause restrictions on the states' powers to impose their taxes upon entities engaged in interstate commerce. However, Petitioner specifically notes that, while this Court overruled the case of *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 95 L.Ed. 573, 71 S. Ct. 508 (1951), and the holding of that case that no direct tax could be imposed upon interstate commerce or the privilege of doing business in interstate commerce, the rule of *Spector,* and the case which overruled and modified it, *Complete Auto Transit, Inc. v. Brady,* were addressing indirect taxes on the privilege of doing business in interstate commerce. While there has certainly been an expansion of the concept announced in *Complete Auto Transit,* and this Court has consistently held that interstate commerce may be obliged to bear its fair share of the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of the commodity which is itself being transported in interstate commerce.

Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit*, from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi, determined upon the gross sales or gross income derived from the activity within the State of Mississippi. The taxpayer, in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi, was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax on the **value** of the vehicles being moved in interstate commerce; rather, it was a tax based on the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test to determine the validity of a state tax affecting interstate commerce:

1 – The activity must be sufficiently connected to the state to justify the tax (the *nexus* requirement).

2 – The tax must be *fairly related* to benefits provided by the state to the taxpayer.

3 – The tax must not *discriminate* against interstate commerce.

4 – The tax must be *fairly apportioned.*

[The first paragraph on page 18 discusses the cases of *D.H. Holmes Co., Ltd. v. McNamara,* 486 U.S. 24 (1988) and *Oklahoma Tax Commission v. Jefferson Lines, Inc.,* ___ U.S. ___, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)]

Arkla No. 92-218

Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit,* from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi which tax was determined based upon the gross sales or gross income derived from the activity within the State of Mississippi. Complete Auto Transit was in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi. Complete Auto Transit was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax upon the **value** of the vehicles being moved in interstate commerce, rather it was a tax based upon the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test of *Complete Auto Transit,* noting, that to avoid conflict with the Commerce Clause, the challenge tax (1) must have a sufficient nexus with the state imposing the tax, (2) must be fairly apportioned, (3) must not discriminate against interstate commerce, and (4) must be reasonably related to the services provided by the taxing state.

* * *

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has never authorized the direct imposition of an unapportioned excise tax upon the value of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas, Texas Gas,* and *Michigan Wisconsin Pipe Line v. State,* the facts are undisputed that the natural gas which Louisiana seeks to tax in these proceedings never was removed from interstate commerce and never came to rest within the State of Louisiana before it was consumed as fuel for the interstate compressors – totally within the confines of the interstate pipeline system and in furtherance of the interstate journey.

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has **never** authorized the direct imposition of an unapportioned excise tax upon the **value** of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas, Texas Gas,* and *Michigan Wisconsin Pipeline,* the facts are undisputed that the natural gas at issue in these proceedings never was removed from interstate commerce and never came to rest within the State of Arkansas before it was consumed as fuel for the interstate compressors. This gas was consumed totally within the confines of the interstate pipeline system.

* * *

C. Summary.

Louisiana recognizes that its taxing power does not extend to "bona fide interstate commerce". La.R.S. 47:305(E)(1). However, if the compressor fuel at issue here can be taxed, then airline fuel consumed by planes passing over the several states can be taxed by those states, diesel fuel burned by the trains and trucks passing through Louisiana or any other state and by boats moving barges on navigable streams in Louisiana or any other state can likewise be taxed.

C. Summary.

The Court's denial of this writ application will open the floodgate of taxing activities by the states on the value of products being transported in interstate commerce. If the natural gas at issue in this case can be taxed, then the airline fuel consumed by planes passing over the several states can be taxed by those states, the diesel fuel burned by the trains passing through Arkansas and by the boats moving barges on navigable streams in Arkansas can likewise be taxed.

(3)

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

NO. 95-53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

AMICUS CURIAE BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY COLUMBIA GULF TRANSMISSION COMPANY

JOHN H. CHEATHAM, III*
Interstate Natural Gas Association
of America
555 13th Street, N.W., Suite 300W
Washington, D.C. 20004
Telephone: (202) 626-3213
Counsel for Interstate Natural Gas Association of America
*Counsel of Record

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

BEST AVAILABLE COPY

18 pp

TABLE OF CONTENTS

Page:

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

The Department's attempted imposition of the use tax on compressor fuel powering the purely interstate transportation of natural gas violates the Commerce Clause of the United States Constitution 3

CONCLUSION 11

APPENDIX A-1

A - Listing of INGAA's active members

TABLE OF AUTHORITIES

Page:

CASES:

Bingaman v. Golden Eagle Western Lines, Inc., 297 U.S. 626, 56 S. Ct. 624, 80 L.Ed. 928 (1936) 7

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed. 2d 326, reh. den., 430 U.S. 976, 97 S.Ct 1669, 52 L.Ed. 2d 371 (1977) 2,4-6

Helson & Randolph v. Kentucky, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929) 2,7

McNamara v. D. H. Holmes Co., Ltd., 505 So. 2d 102 (La. App. 4th Cir.), writ den., 506 So. 2d 1224 (La. 1987), aff'd., 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed. 2d 21 (1988) 8-9

Midwestern Gas Transmission Co. v. Wisconsin Dept. of Revenue, 84 Wis. 2d 261, 267 N.W.2d 253, cert. den., 439 U.S. 997, 99 S. Ct. 598, 58 L.Ed.2d 670 (1978) 6-7

National Geographic Society v. California Board of Equalization, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed. 2d 631 (1977) 4-5

TABLE OF AUTHORITIES (cont'd)

Page:

CASES:

Oklahoma Tax Commission v. Jefferson Lines, Inc.,
___ U.S. ___, 115 S. Ct. 1331, 131 L. Ed. 2d 261;
reh. den., ___ U.S. ___, 115 S. Ct. 2018,
63 USLW 3833, on remand, ___ F. 3d. ___,
1995 WL 380846 (8th Cir. 1995) 10

Pledger v. Arkla, Inc.
827 S.W. 2d 126 (Ark.), cert den.,
___ U.S. ___, 113 S. Ct. 203,
121 L. Ed. 2d 144 (1992) 7-8

Texas Gas Transmission Corp. v. Benson,
223 Tenn. 279, 444 S.W.2d 137, 139 (1969) 5-6

CONSTITUTION:

United States Constitution, Article I,
Section 8, Clause 3 3

STATUTES:

Federal:

15 U.S.C. §§717-717w 1

15 U.S.C. §§3301-3432 1

TABLE OF AUTHORITIES (cont'd)

Louisiana Revised Statutes:

La. R.S. 47:305(E)(1)
[formerly La. R.S. 47:305(5)] 8

INTEREST OF THE *AMICUS CURIAE*

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association which represents virtually all of the major interstate natural gas transmission companies operating in the United States. The member companies account for over 90% of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipeline companies subject to regulation by the National Energy Board of Canada, as well as British Gas, plc, Pemex-Gas y Petroquimica Basica of Mexico, and Gaz de France. INGAA's United States members are regulated by the Federal Energy Regulatory Commission ("FERC") pursuant to the Natural Gas Act, 15 U.S.C. §§717-717w, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301-3432. A listing of INGAA's active members is attached to this brief as Appendix "A". Counsel for both parties have consented to the filing of this *amicus curiae* brief, and their consents are on file with the Clerk of Court.

INGAA's United States members are vitally interested in the outcome of this proceeding because they transport natural gas in interstate commerce, and have more than 300,000 miles of pipelines and related facilities, including compressor stations, both within and without the state of Louisiana, and within all of the states which have reached conflicting results on this issue as set forth in the petition of Columbia Gulf Transmission Company ("Columbia Gulf"). Thus, INGAA has a unique perspective to offer on the issues involved in this case, and its members will be directly and substantially affected by its outcome.

INGAA fully supports the position taken by Columbia Gulf throughout this litigation and, in the interest of space, relies

on the statement of the case in Columbia Gulf's petition. When the Louisiana Department of Revenue and Taxation ("Department") attempts to tax the compressor fuel at issue in this litigation, it is attempting to tax interstate commerce. The entire operation of Columbia Gulf and other similarly situated pipeline companies is the transportation of natural gas in interstate commerce. The natural gas which comprises the compressor fuel is taken directly from a pipeline involved in the continuous, uninterrupted transportation of natural gas in interstate commerce through and beyond Louisiana.

INGAA submits, for the reasons set forth hereinafter, that the applicable federal constitutional principles do not permit the imposition of the Louisiana sales and use tax under the circumstances of this case.

SUMMARY OF ARGUMENT

Columbia Gulf has argued persuasively in its petition that this case is controlled by *Helson & Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L. Ed. 683 (1929), and that the cavalier dismissal of that case as "superseded" by the Supreme Court of Louisiana was erroneous and unwarranted.

While fully supporting Columbia Gulf's position, INGAA argues further that the decision below was incorrect even when viewed solely in light of the four prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, reh. den., 430 U.S. 976, 97 S. Ct. 1669, 52 L. Ed. 2d 371 (1977). That test requires a nexus between the activity being taxed and the taxing state, and that nexus is lacking here because the activity which the State of Louisiana seeks to tax is purely and simply interstate commerce itself—the continuous, uninterrupted

transportation of natural gas to points beyond the State of Louisiana.

ARGUMENT

The Department's attempted imposition of the use tax on compressor fuel powering the purely interstate transportation of natural gas violates the Commerce Clause of the United States Constitution.

In its unique capacity as representative of the interstate natural gas transportation industry, INGAA is vitally interested in the federal constitutional issues presented by this case. As a national trade association with members owning and operating more than 300,000 miles of pipeline, located in all of the states that have both upheld and struck down similar taxes,[1] INGAA and its members are also vitally interested in a definitive resolution by this Court of those federal constitutional issues.

It is INGAA's position that the attempted imposition of a state use tax on the purely interstate operations of Columbia Gulf and other pipelines similarly situated violates the Commerce Clause of the United States Constitution. The Commerce Clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Article I, Section 8, Clause 3. Over the years, the interplay between the Commerce Clause and state taxing powers has provided an extremely fertile field for litigation and dispute. At one time, the basic rule was that states could not

---

[1] See Columbia Gulf's Petition, pp.8-11.

tax interstate commerce. The present rule is more sophisticated: interstate commerce may be taxed locally, but only within well-developed guidelines and limitations.

The landmark decision on the relationship between interstate commerce generally and a state's taxing powers is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed. 2d 326, reh. den., 430 U.S. 976, 97 S.Ct 1669, 52 L.Ed. 2d 371 (1977). *Complete Auto Transit* involved the validity of a Mississippi franchise tax which was measured by gross revenues, as applied to charges for transportation of imported motor vehicles from a rail depot in Jackson to dealers throughout the state. The court "assumed" that the transportation was in interstate commerce, but nonetheless upheld the application of the tax.

Complete Auto Transit clarified much of the prior case law by reiterating that "interstate commerce may be made to pay its way" (430 U.S. at 281, 97 S. Ct. at 1080), and establishing a four part test to determine the validity of a state tax affecting interstate commerce:

1 - There must be sufficient *nexus* between the *activity* and the state to justify the imposition of the tax.[2]

---

[2] In the courts below, the Department erroneously argued that the nexus required to support imposition of the tax need not be between the *activity* sought to be taxed and the taxing state, but merely between the *taxpayer* and the taxing state. To support this proposition, the Department cited *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed. 2d 631 (1977). *National Geographic* is perhaps something of an aberrant decision on this issue, based on facts totally different from those present here, and

2 - The tax must be *fairly related* to benefits provided by the state to the taxpayer.

3 - The tax must not *discriminate* against interstate commerce.

4 - The tax must be *fairly apportioned.*

If a state tax violates any one of these four prongs, then the tax must be stricken as violative of the commerce clause.

Prior to *Complete Auto Transit*, in the first reported decision on all fours with the present case, the Supreme Court of Tennessee struck down a virtually identical Tennessee sales and use tax, which was also sought to be imposed on fuel used for compression of mainstream gas being transported interstate. *Texas Gas Transmission Corp. v. Benson*, 223 Tenn. 279, 444 S.W.2d 137 (1969):

> [T]he fuel gas does not come to rest in this State nor does it become a part of the mass of property within this State. ***It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in***

---

in any case apparently limited to the duty to *collect* the use tax (rather than to *pay* a direct tax). 430 U.S. at 560, 97 S.Ct. at 1392. The actual test was stated very clearly in *Complete Auto Transit*, and repeated countless times thereafter: a tax may be sustained "against Commerce Clause challenge when the tax is applied to *an activity* with a substantial nexus with the taxing State . . .". 430 U.S. at 279, 97 S.Ct. at 1079 (emphasis added).

> ***interstate commerce. It is, therefore, a necessary and integral part of the interstate operation.***

Texas Gas at 139 (emphasis added).

The Tennessee court's unsuccessful search for a "taxable moment" in *Texas Gas* was a portent of this Court's more complete articulation of the nexus requirement a few years later in *Complete Auto Transit*. The importance of the decision for purposes of our present analysis is that it represents the proverbial spotted cow case, in which the court correctly concluded that the consumption of the compressor fuel involved purely interstate commerce, with no requisite in-state taxable moment.

The identical issue was considered by the Supreme Court of Wisconsin in a case decided after *Complete Auto Transit*, with the exact same result that the Tennessee Supreme Court reached in *Texas Gas*. *Midwestern Gas Transmission Co. v. Wisconsin Dept. of Revenue*, 84 Wis. 2d 261, 267 N.W.2d 253, cert. den., 439 U.S. 997, 99 S. Ct. 598, 58 L.Ed.2d 670 (1978):

> Here, the department seeks to impose a use tax on that amount of natural gas consumed in engines which provide the pressure necessary to propel the great bulk of the taxpayer's gas through interstate commerce. Although this activity takes place within the state, ***we are satisfied that this consumption is an integral part of the process of interstate commerce which does not have a substantial nexus with the state. Thus, it remains immune from state taxation by reason of the Commerce Clause.***

Midwestern Gas at 258 (emphasis added). Both the analysis and result in *Midwestern Gas* underscore the continued persuasiveness of the *Texas Gas* approach in the post-*Complete Auto Transit* world.

Both *Texas Gas* and *Midwestern Gas* cited and relied on *Helson and Randolph v. Kentucky*, 279 U.S. 245, 49 S. Ct. 279, 73 L.Ed. 683 (1929). In that case the taxpayers operated a ferry on the Ohio River between Illinois and Kentucky. All gasoline needed to fuel the ferry was purchased in Illinois, although 75% of it was consumed within Kentucky. Kentucky taxed all gasoline sold or used within the state, and sought to impose the use tax on that portion of the ferry's fuel consumed in Kentucky waters. The Supreme Court of the United States struck down Kentucky's attempted imposition of the use tax as violative of the Commerce Clause of the United States Constitution. In spite of the short shrift given *Helson* by the Supreme Court of Louisiana, it has not been overruled and provides compelling authority in support of Columbia Gulf's position in this case.[3] See also *Bingaman v. Golden Eagle Western Lines, Inc.*, 297 U.S. 626, 56 S. Ct. 624, 80 L.Ed. 928 (1936).

As noted, this case presents a clear example of an improper taxation of interstate commerce. That is not necessarily the case with conflicting decisions from other jurisdictions. For example, it clearly is not the case in *Pledger v. Arkla, Inc.*, 827 S.W. 2d 126 (Ark.), cert den., ___ U.S. ___, 113 S. Ct. 203, 121 L. Ed. 2d 144

---

[3] In order to avoid repetition, INGAA does not include a detailed analysis of *Helson*. However, it joins in and supports without reservation the arguments set forth at pp.11-19 of Columbia Gulf's Petition.

(1992). In that case, the Supreme Court of Arkansas expressly noted that "Arkla owns and operates an extensive network of pipelines throughout Arkansas in which it produced, bought, transported, and sold natural gas." 827 S.W. 2d at 129. This key factual distinction ultimately controls whether the federal constitutional nexus test has been satisfied. Columbia Gulf sells no gas in Louisiana and its only intrastate "use" of the compressor fuel is to propel the balance of the gas stream on its journey to Kentucky—a direct, integral and essential part of Columbia Gulf's purely ***interstate*** operations.

The Supreme Court of Louisiana stated in its opinion that it granted a writ in this case "to consider a possible conflict with" *McNamara v. D. H. Holmes Co., Ltd.*, 505 So. 2d 102 (La. App. 4th Cir.), writ den., 506 So. 2d 1224 (La. 1987), aff'd., 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed. 2d 21 (1988).[4] However, there clearly is no conflict because of the vastly different factual backgrounds of the cases, bringing into play entirely different legal considerations. In *D. H. Holmes*, the lower courts specifically found that the catalogs at issue came to rest in the mail boxes of Holmes' Louisiana customers. The Court of Appeal cited La. R.S. 47:305(5) [the predecessor to 305(E)(1)] and held:

> The taxable moment occurs "when the property has been withdrawn from interstate commerce and has become part of the mass of the property of the taxing state."

505 So. 2d at 105 (citations omitted). With the threshold issue of Louisiana's statutory authority to levy the tax already resolved by the state courts, this Court ultimately affirmed the validity of the tax on purely constitutional grounds, noting that there was

---

[4] Columbia Gulf's Petition, p.A-2.

nexus "aplenty" and citing four uncontested factors that dramatically differentiate that case from this one, and which demonstrate that the activity which *Holmes* was engaged in—the distribution of catalogs to Louisiana residents—had a very substantial nexus with the state:

1 - "Louisiana imposed its use tax only on the 82% of the catalogs distributed in-state. . . ". 108 S.Ct. 1619, 1624.

2 - "Holmes admits that it initiated the distribution to improve its sales and name recognition among Louisiana residents." *Id.*

3 - "Holmes also has . . . 13 stores and over $100 million in annual sales in" Louisiana. *Id.*

4 - "The distribution of catalogs to approximately 400,000 Louisiana customers was directly aimed at expanding and enhancing [Holmes'] Louisiana business." *Id.*

This case does not involve any such *local* factors. Interstate natural gas pipeline companies such as Columbia Gulf and other INGAA members similarly situated certainly do not sell by catalog, or in the intrastate market at all. They obviously do not seek to enhance their Louisiana name-recognition or sales or business, as D. H. Holmes did, because such considerations are irrelevant to their purely interstate operations.

This Court's most recent treatment of the interplay between the Commerce Clause and state taxing powers is also

instructive, and deals with many of the purely local factors that distinguish *D. H. Holmes. Oklahoma Tax Commission v. Jefferson Lines, Inc.*, ___ U.S. ___, 115 S. Ct. 1331, 131 L. Ed. 2d 261; reh. den., ___ U.S. ___, 115 S. Ct. 2018, 63 USLW 3833, on remand, ___ F. 3d. ___, 1995 WL 380846 (8th Cir. 1995). That case permitted the imposition of the Oklahoma sales tax on bus tickets sold for interstate trips, recognizing that the ticket was bought and sold in Oklahoma and the trip originated there. Thus, the sale of the bus ticket could be characterized as a wholly local transaction.

In stark contrast, no such local or taxable moments are present in this case. There is a continuous, uninterrupted flow of natural gas through and beyond the State of Louisiana. In order to fuel that interstate transmission, a small amount of natural gas is tapped directly from the stream and consumed immediately. If there is nexus between that activity and the State of Louisiana sufficient to justify the imposition of the use tax in *this* case, then arguably there would be sufficient nexus between any aspect of interstate commerce and the state in which it happens to take place in *any* case. INGAA submits that the practical effect of such a holding would be to come full circle, a move from the old view that interstate commerce was exempt from taxation, to an effective result that, at least insofar as the nexus requirement is involved, interstate commerce is subject to a state's unfettered taxing power. There is no indication that this Court ever intended to reach or allow such a result; indeed, *Oklahoma Tax Commission* and its predecessors indicate the exact contrary.

Quite simply, this case involves the attempted taxation by a state of interstate commerce in its purest form. That attempt is impermissible under the Commerce Clause of the United States Constitution.

CONCLUSION

As the national trade association representing virtually all of the interstate natural gas transmission companies, which do business in all of the states which have both upheld and struck down similar taxes, INGAA has a unique perspective and interest in this case. As such, it respectfully urges that Columbia Gulf's Petition for Writ of Certiorari should be granted, so that the conflicts among the states may be resolved and the issue decided definitively by this Court. INGAA further submits that the purely interstate operations of Columbia Gulf and other pipeline companies similarly situated are not properly subject to Louisiana or other state use taxes under the Commerce Clause of the United States Constitution, and that ultimately the decision of the Supreme Court of Louisiana should be reversed.

John H. Cheatham, III*
Interstate Natural Gas
Association of America
555 13th Street N.W., Suite 300 W
Washington, D.C. 20004
Telephone: (202) 626-3213
Telecopier: (202) 626-3250
Counsel for Interstate Natural Gas Association of America
* Counsel of Record

August ____, 1995

APPENDIX "A"

Alabama-Tennessee Natural Gas Company
Alberta Natural Gas Company Ltd.
British Gas pic
The Coastal Corporation
COHO Resources, Inc.
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Delhi Gas Pipeline Corporation
El Paso Natural Gas Company
Enron Corp.
Equitrans, Inc.
Foothills Pipe Lines Ltd.
Gaz de France
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
KN Energy, Inc.
Koch Hydrocarbon Company
Leviathan Gas Pipeline Company
Lone Star Gas Company
Michigan Gas Storage Company
MidCon Corp.
National Fuel Gas Company
NorAm Energy Corp.
Northern Border Pipeline Company
NOVA Corporation of Alberta
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Pemex-Gas y Petroquimica Basica
Questar Pipeline Company
Sabine Pipe Line Company

APPENDIX "A" (cont'd)

SaskEnergy
Sonat Inc.
Tenneco Gas
TransCanada PipeLines
Valero Interstate Transmission Company
Westcoast Energy, Inc.
Williams Natural Gas Company
Williston Basin Interstate Pipeline Company

No. 95-53

In The
Supreme Court of the United States

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
PETITIONER

v.

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT
OF REVENUE AND TAXATION, STATE OF LOUISIANA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

CERTIFICATE OF SERVICE

I, John H. Cheatham, III, a member of the Bar of this Court, hereby certify that on this 14th day of August, 1995, three copies of the *Amicus Curiae* Brief of the Interstate Natural Gas Association of America in Support of Columbia Gulf's Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to James A. Burton, Esq., Simon, Peragine, Smith & Redfearn, L.L.P., 1100 Poydras Street, 30th Floor, New Orleans, LA 70163-3000, telephone: (504) 569-2030, plaintiff, and to Robert G. Pugh, Esq., Pugh, Pugh & Pugh, Commercial National Towers, 333 Texas Street, Suite 2100, Shreveport, Louisiana 71101, telephone: (318) 227-2270, counsel for respondent herein. I further certify that all parties required to be served have been served.

John H. Cheatham, III
Interstate Natural Gas Association
of America
555 13th Street, N.W., Suite 300 West
Washington, D.C. 20004

...TION FILED
SEP 8 1995

No. 95-53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Respondent.

On Petition for A Writ Of Certiorari To The Supreme Court of Louisiana

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

David J. Muchow
Counsel of Record
General Counsel and
Corporate Secretary

Dan L. Sanford
Deputy General Counsel

American Gas Association
1515 Wilson Boulevard
Arlington, VA 22209
(703) 841-8533

Date: September 8, 1995

28 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-53

COLUMBIA GULF TRANSMISSION COMPANY,
Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Respondent.

On Petition for A Writ Of Certiorari To The Supreme Court of Louisiana

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION

Pursuant to Rules 30.4 and 37.2[1], the American Gas Association (hereafter, A.G.A. or the Association) respectfully moves for an enlargement of the time within which to file a brief *amicus curiae,* and for leave to file the attached brief *amicus curiae* in support of Columbia Gulf Transmission Co.'s (Columbia) petition for writ of certiorari. Counsel for Petitioner and Respondent consent to the filing of this brief.

A.G.A.'s Position.

Rule 37.2 requires that briefs *amicus curiae* be filed "only if submitted within the time allowed for filing a brief in opposition to the petition for a writ of certiorari or for filing a motion

[1]Sup. Ct. R. 30.4, 37.2 (1995)

to dismiss or affirm." The petition for certiorari was filed by Columbia on July 5, 1995. A.G.A.'s *amicus* brief was due on August 4, 1995. A.G.A. represents to the Court that it was not a participant in the proceedings below and was not informed of the pendency of this petition until following the time the *amicus* brief was due. A.G.A. believes, however, that A.G.A.'s perspective on the primary issue in this matter would be of benefit to the Court. A.G.A., as a national not-for-profit trade association, has more than 275 member companies consisting of distribution companies, interstate pipelines, marketing companies and gathering companies involved in the production, sale, transportation and distribution of natural gas throughout the United States, Canada and Mexico. A.G.A.'s member companies account for more than 90% of the gas delivered in the United States and provide service to nearly 58 million residential, industrial and commercial customers. A.G.A's member companies, including the petitioner, Columbia, will be directly affected by the outcome of this proceeding.

This matter involves the imposition of a use tax on natural gas used as fuel in connection with the interstate transportation of natural gas. The state of Louisiana seeks to tax the use of that fuel even though its purpose is to provide energy necessary to run compressors that assist in moving natural gas transported by Columbia solely in interstate commerce. The imposition of the tax is a burden on interstate commerce in contravention of the Commerce Clause of the Constitution.[2]

A.G.A.'s Reasons for its Brief *Amicus Curiae*.

A.G.A. seeks to file the attached brief for several reasons: 1) state taxation of this fuel use is inappropriate under the Commerce Clause; 2) the Supreme Court of Louisiana inappropriately discounted this Court's prior decisions on matters

[2]U.S.Const. art.I, §8, cl. 3

of this nature, creating the wrong impression that this Court's view of the Commerce Clause had been substantially changed; 3) the several states of Wisconsin, Tennessee, Arkansas, Mississippi, Utah, and Louisiana have reached differing conclusions regarding the propriety of similar taxes and the resolution of such differences is important to industries doing business in these states, to the national natural gas industry as a whole, and to A.G.A.'s membership located in all 50 states; and 4) the emerging national natural gas marketplace will be adversely affected if Louisiana and other states are allowed to impose such use taxes.

A.G.A.'s view of the national natural gas marketplace is important in this Court's consideration of this petition for certiorari. This tax is contrary to the express policy of the United States Congress. Congress, in passing the Natural Gas Policy Act of 1978[3] and the Wellhead Decontrol Act of 1989[4] created the legislative framework for a substantially deregulated national natural gas marketplace. The Federal Energy Regulatory Commission (FERC), in implementing that legislative mandate, issued a number of orders that brought life and substance to that legislative mandate. Among those orders were Order No. 436,[5] Order No. 500,[6] and Order

---

[3]Natural Gas Policy Act of 1978, 15 U.S.C. §3301, *et seq.* (1982).

[4]Pub. L. No. 101-60, 103 Stat. 157 (1989) (*codified at various sections of 15 U.S.C. §3301 (1982)*).

[5]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 (1985), *vacated and remanded, Associated Gas Distributors, v. FERC*, 824 F.2d 981 (D.C.Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[6]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,761 (1987), *remanded, American Gas Association v. FERC*, 888 F.2d 136 (D.C.Cir. 1989), *readopted*, Order No. 500-H, III FERC Stats. & Reg. [Reg. Preambles] ¶30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III FERC Stats & Reg. [Reg. Preambles] ¶30,880 (1990) *aff'd in part and remanded in part, American Gas Association, v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

No. 636.[7] Those orders, together with the Congressional mandate, transformed the natural gas industry from a highly regulated and structured industry to one marked by free and open competition for gas supplies and transportation services. Critical to the development of that more open and free marketplace are the interstate pipelines. A.G.A. believes that Louisiana's tax on compressor fuel use is anathema to the open marketplace mandated by Congress. Interstate pipelines are the only "instrumentalities of interstate commerce" through which the interstate commerce in natural gas can be conducted.

For the foregoing reasons, the Association, on behalf of its members, respectfully requests the Court grant this motion to enlarge the time to file the attached brief, and for leave to file the brief *amicus curiae* so that the views in the attached brief may be considered by this Court.

Respectfully submitted,

AMERICAN GAS ASSOCIATION

David J. Muchow
General Counsel and Corporate Secretary

Dan L. Sanford
Deputy General Counsel

American Gas Association
1515 Wilson Boulevard
Arlington, VA 22209
(703) 841-8533

[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,939 (1992), (Order No. 636), *order on reh'g*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,950 (1992) (Order No. 636-A), *order on reh'g*,61 FERC ¶61,272 (Order No. 636-B).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THIS COURT'S *HELSON* DECISION HAS NOT BEEN "SUPERSEDED" BY *COMPLETE AUTO TRANSPORT* 2

II. LOUISIANA INCORRECTLY APPLIES THE TEST ESTABLISHED IN *COMPLETE AUTO TRANSIT* 12

CONCLUSION 17

TABLE OF AUTHORITIES

Cases Page

Columbia Gulf Transmission Co. v. Broussard, 653 So. 2d 522 (La. S.Ct. 1995).....2

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).....*passim*

Edelman v. Boeing Air Transport, 289 U.S. 249 (1933).....6

Helson & Randolph v. Commonwealth of Kentucky, 279 U.S. 245 (1929).....*passim*

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).....6

Midwest Gas Transmission Co. v. Wisconsin Department of Revenue, 84 Wis.2d 261, 267 N.W.2d 253 (1978)....8, 14

Nashville, Chattanooga & St. Louis R. Co. v. Wallace, 288 U.S. 249 (1933).....6

National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977).....15, 16

Pledger v. Arkla, Inc., 309 Ark. 10, 827 S.W.2d 126 (1992).....15, 16, 18

Questar Pipeline Co. v. Utah State Tax Commission, 817 P.2d 316 (Utah 1991).....15, 16, 18

Spector Motor Service v.O'Connor, 340 U.S. 602 (1951) 6, 7, 8

Tennessee Gas Pipeline Co. V. Marx, 594 So.2d 615 (Miss. 1992).....15, 16, 18

Page

United Airlines v. Mahin,
410 U.S. 623 (1973) 5, 6

Constitution

U.S.Const. art.I, §8, cl.3. 2

Statutes

The Natural Gas Policy Act of 1978,
15 U.S.C. §§3301, *et seq.* (1982).....3

The Wellhead Decontrol Act of 1989,
Pub. L. No.101-60, 103 Stat. 157 (1989) (*codified at various sections of 15 U.S.C.* §3301 (1982)).....3

Administrative Proceedings

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 (1985), *vacated and remanded, Associated Gas Distributors, v. FERC*, 824 F.2d. 981 (D.C.Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).....10

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, III FERC Stats. & Reg. [Reg. Preambles] ¶30,761 (1987), *remanded, American Gas Association v. FERC*, 888 F.2d 136 (D.C.Cir. 1989), *readopted*, Order No. 500-H, III FERC Stats. & Reg. [Reg. Preambles] ¶30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III FERC Stats. & Reg. [Reg. Preambles] ¶30,880 (1990), *aff'd in part and remanded in part, American Gas Association, v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).....10

Page

Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of natural Gas Pipelines After Wellhead Decontrol, III FERC Stats. & Regs. [Reg. Preambles] ¶30,939 (1992), Order No. 636), *order on reh'g*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,950 (1992) (Order No. 636-A), *order on reh'g*, 61 FERC ¶61,272 (1992) (Order No. 636-B).....10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-53

COLUMBIA GULF TRANSMISSION COMPANY,
Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Respondent.

On Petition for A Writ Of Certiorari To The Supreme Court of Louisiana

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

The American Gas Association (A.G.A. or the Association) submits this brief *amicus curiae* in support of the petitioner, Columbia Gulf Transmission Co. (Columbia).

INTEREST OF THE *AMICUS CURIAE*

A.G.A. is a national, not-for-profit trade association with more than 275 member companies engaged in the business of producing, gathering, transporting and distributing natural gas to more than 58,000,000 residential, industrial and commercial customers throughout the United States, Canada and Mexico. A.G.A.'s member companies account for more than 90% of all the natural gas delivered in the United States.

The question presented in this case is important to A.G.A.'s member companies. The issue in this proceeding is whether the state of Louisiana may impose a use tax on fuel used to operate compressors that provide the energy to move natural gas through interstate commerce. A.G.A.'s member companies, including pipelines, distribution companies and marketing companies believe that the tax sought to be imposed is a direct burden on interstate commerce. This Court has previously found that such a direct burden violates the Commerce Clause.[1] Congress and the FERC have endeavored over the last decade to create the framework of a national natural gas marketplace. The key ingredient in the development of that national market is the interstate pipeline network. It is only through that network that the interstate commerce in natural gas can reasonably be conducted. Because A.G.A.'s member companies either are interstate pipelines or customers of interstate pipelines that receive some form of interstate service, either directly or indirectly, A.G.A.'s members have an interest in this proceeding. Because A.G.A.'s member companies may pay the tax imposed by Louisiana, or those imposed in other states, A.G.A. files this *amicus* brief to urge the Court to issue its writ of certiorari to consider this matter.

SUMMARY OF ARGUMENT

THE STATE OF LOUISIANA ERRED IN DECLARING THAT THIS COURT'S DECISION IN *HELSON V. COMMONWEALTH OF KENTUCKY* HAS BEEN SUPERSEDED.

The Supreme Court of Louisiana erred in two respects in reaching its decision in this matter.[2] First, Louisiana incorrectly ignored this Court's decision in *Helson v. Common-*

---

[1]U.S.Const. art.I, §8, cl.3.

[2]*Columbia Gulf Transmission Co. v. Broussard*, 653 So. 2d 522 (La.S.Ct. 1995).

wealth of Kentucky, 279 U.S. 245 (1929) by declaring that it had been "superseded"[3] by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Louisiana offers no support for this assertion. A proper reading of this Court's decisions in *Helson* and *Complete Auto* shows that *Helson* remains an important element of this Court's consideration of the Commerce Clause. Further, a proper reading of those cases in the context of today's national natural gas market will establish that Louisiana's use tax on compressor fuel directly burdens interstate commerce. Interstate pipelines are the only means by which the national market in natural gas can be conducted. The fuel used to propel that natural gas on its interstate journey is an "instrumentality in interstate commerce".[4] As such, its use should not be subject to Louisiana's use tax. The Commerce Clause[5] restricts the rights of several states to impose taxes on interstate commerce.

THE STATE OF LOUISIANA'S SOLE RELIANCE ON THIS COURT'S DECISION IN *COMPLETE AUTO TRANSIT, INC. V. BRADY* IS NOT APPROPRIATE IN LIGHT OF THE EMERGENCE OF A NATIONAL NATURAL GAS MARKETPLACE.

Secondly, Louisiana's mechanical recitation of the elements that this Court considered in *Complete Auto* focused incorrectly on Columbia's nexus with the state of Louisiana and ignored the essential fact that the compressor fuel use was interstate in character. Many interstate activities protected by the Commerce Clause have some element that begins and ends within a given state. A proper analysis of the activity taxed establishes that such activity is fundamental to interstate commerce,

---

[3] *Id.*, at 524.

[4] *Helson & Randolph v. Kentucky*, 279 U.S. 245, 252.

[5] U.S. Const., *Supra*, note 1.

is in fact solely interstate in character, and as such should not be subject to the state tax.

Over the last decade, Congress and the Federal Energy Regulatory Commission (FERC) have endeavored to transform the natural gas marketplace from one characterized by legislative and administrative control and restrictions to one that is national in scope. Congress and the FERC have been largely successful in transforming the market into one where gas produced off-shore of Louisiana or in any other gas producing state can be purchased by anyone willing to pay the price and have that gas transported to literally any state on the continent. The marketplace for natural gas is the interstate pipelines' system. It is only through interstate pipelines that the nation's interstate commerce in natural gas can be conducted. In that context, the tax imposed by Louisiana is a direct burden on interstate commerce and violates the Commerce Clause.

The restrictions imposed on the states by the Constitutional framers should be given weight in this context and Louisiana's tax on compressor fuel use should be judged by this Court to be a burden on interstate commerce contrary to the limitations of the Commerce Clause. This Court should grant Columbia's petition for certiorari.

ARGUMENT

I. THIS COURT'S *HELSON* DECISION HAS NOT BEEN "SUPERSEDED" BY *COMPLETE AUTO TRANSPORT.*

Louisiana's fundamental position is that this Court's decision in *Helson* has been superseded by *Complete Auto Transit*. The Association believes that this position is in error. Since this position is a primary element of Louisiana's decision, this

Court should grant certiorari to review Louisiana's application and interpretation of this Court's prior decisions.

As this Court has noted on numerous occasions, the line drawing exercise to distinguish between permissible state action and conduct by the states that is prohibited by the Commerce Clause is a difficult process.[6] In *Helson*, this Court struck down a state use tax on fuel consumed by a ferry boat because "A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce."[7]

The Court below dismisses the import of *Helson* by summarily concluding that this Court "superseded" its decision in that case with its decision in *Complete Auto Transit*. Louisiana then proceeds to attempt to apply the elements of the test established by this Court in *Complete Auto Transit*. The Association believes that Louisiana's unsupported assertion is in error. A more appropriate reading of the *Helson* and *Complete Auto Transit* decisions would find that *Helson* remains an important part of this Court's consideration of the Commerce Clause. Further, in light of the marketplace that exists today in the natural gas industry, *Helson* is, and should continue to remain, relevant and applicable.

Helson establishes that Kentucky's use tax on the consumption of fuel within that state was a direct tax on an instrumentality of interstate commerce. The fuel could not be separated from the engine or from the ferry boat itself. In *United Airlines v. Mahin*[8] this Court was called upon to consider an Illinois tax on the removal of fuel from storage. The Court upheld

---

[6] "We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult." *United Airlines v. Mahin*, 410 U.S. 623, 629 (1973).

[7] 279 U.S. 245, 252.

[8] 410 U.S. 623 (1973).

the tax (but remanded the decision for other reasons). In so doing, however, the Court stated:

> "The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) nor by the State in which it is merely consumed, under *Helson*."[9]

In *Complete Auto Transit*, this Court did not seek to "supersede" or otherwise disturb the principle that a tax on the fuel of an instrumentality of interstate commerce is impermissible. What this Court expressly did in *Complete Auto Transit* was to overturn another decision, *Spector Motor Service v. O'Connor*.[10] In *Spector* and the cases following, the Court engaged in an attempt to draw the line between taxes that were imposed by states on the "privilege of doing interstate business" which were impermissible, and those that reached appropriate taxable events, but measured the amount of tax using the revenues derived from the business' intra- and interstate activities. While each attempted tax had the same economic effect on the company taxed, the *Spector* rule simply created draftsmanship problems for states and companies subject to the tax. In overruling the *Spector* decision, this Court noted:

---

[9]410 U.S. 623, 629.
[10]340 U.S. 602 (1951).

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on the formalism merely obscures the question *whether the tax produces a forbidden effect. Simply put, the Spector rule does not address the problems with which the Commerce Clause is concerned* (emphasis added).[11]

Complete Auto Transit should not be read as the sole test to be utilized in examining the propriety of all state taxes on activities in interstate commerce. Rather, *Complete Auto Transit* should be read as this Court intended:

> Accordingly, we now reject the rule of *Spector Motor Service, Inc. v. O'Connor,* that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce, and that case is overruled."[12]

The Court in *Complete Auto Transit* never intended to address taxes other than taxes that purport to attach to "doing business" within a given state; nor did it seek to develop a "test" to be applied to all tax cases relating to the Commerce Clause. This Court did not implicitly overrule *Helson*. It directly overruled *Spector*. It seems extremely unlikely, if not patently incorrect, to suggest that this Court indirectly or implicitly "superseded" a line of decisions relating to specific use taxes when it took considerable effort to *expressly* overrule a series of cases that involved an entirely different type of tax, namely a "doing business" tax. This Court is not so cavalier as to endeavor to provide better understanding of the parameters of the Commerce Clause and thereby create more confusion. The better reading of the *Complete Auto Transit* is that it does what it purports to do: It overturns the rule in the *Spector* case.

The more important language in *Complete Auto Transit* in the Association's view is this Court's identification that the *Spector* case distracted parties from asking the salient question: "Whether the tax produces a forbidden effect?"[13] The Association believes that Louisiana's tax on compressor fuel used by interstate pipelines is a direct burden on that interstate commerce. The forbidden effect is a burden on activity that cannot be separated from the interstate commerce itself, namely using fuel to permit the commerce to be conducted at all. Importantly, if this tax is permitted to remain in effect, nothing would prevent every state from attaching a compressor fuel tax of whatever magnitude it deemed appropriate. The movement of gas from off-shore Louisiana could conceivably be taxed by every state through which the interstate pipeline passed. The Association's members would pay ever increasing costs from this multiple taxation simply for using the interstate pipeline system ***in the manner that Congress and the FERC intended.*** That is a result the Association believes the Constitutional framers sought to avoid, the type of "forbidden effect" that this Court noted was the true issue in matters of this kind.

The Wisconsin Supreme Court concluded that this type of use tax was improper in a case involving essentially the same facts. In so doing, it correctly applied both *Helson* and *Complete Auto Transit*. Wisconsin correctly noted that this Court had not overturned its decision in *Helson* even after the enunciation of the four elements in *Complete Auto Transit*. In *Midwest Gas Transmission Co. v. Wisconsin Department of Revenue*[14] the Wisconsin Department of Revenue sought to tax

---

[13]430 U.S. 274, 288.

[14]84 Wis. 2d 261, 267 N.W.2d 253 (1978).

the fuel used in two compressors of Midwest Gas Transmission. The Wisconsin Court reviewed the line of cases beginning with *Helson* and ending with *Complete Auto*. There the Court concluded:

> [T]he department seeks to impose a use tax on that amount of natural gas consumed in engines which provide the pressure necessary to propel the great bulk of the taxpayer's gas through interstate commerce. Although this activity takes place within the state, we are satisfied that this consumption is an *integral part of the process of interstate commerce* which does not have a substantial nexus with the state. Thus, it remains immune from state taxation by reason of the Commerce Clause. (emphasis added)[15]

The Supreme Court of Wisconsin correctly recognized that, even though the consumption was accomplished within the state and ostensibly created a nexus with the state, the consumption of fuel was so integral to the interstate commerce involved that taxing it would be a direct burden on interstate commerce contrary to the Commerce Clause.

That is fundamental to an understanding of both the *Helson* and *Complete Auto Transit* decisions. The tax in both *Helson* and *Complete Auto Transit* are burdens on interstate commerce. The tax in *Complete Auto Transit* is permissible because there is a sufficient nexus between the activity and the State to permit the tax. That is not the case in *Helson*. The consumption of fuel cannot be distinguished in any rational manner from the act of interstate commerce itself. Without the fuel the compressors cannot operate, the pipes lose pressure and the very act of moving gas cannot be accomplished.

[15]84 Wis. 2d 261, 270, 267 N.W. 2d 253, 258.

The structural changes mandated by Congress and implemented by the FERC make the result reached in *Helson* even more compelling. Congress has reshaped the natural gas market by deregulating the price paid for natural gas when it passed the Natural Gas Policy Act and the Wellhead Decontrol Act[16] and by creating the means for integrating the intra- and interstate pipeline networks.[17] The FERC carried out its obligations under the Congressional mandates of the Natural Gas Policy Act by adopting rules under Orders No. 436,[18] No. 500[19] and No. 636[20] thereby creating an open-access transportation environment that no longer differentiated between intra- and interstate transportation. This Court is largely familiar with these substantial and significant changes to the natural gas marketplace. However, a brief excerpt from the FERC's Order No. 436 is pertinent to the A.G.A.'s view of this proceeding:

---

[16]The Natural Gas Policy Act of 1978, 15 U.S.C.. §§3301, *et seq.* (1982), The Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) (*codified at various sections of 15 U.S.C. §§ 3301 (1982)*).

[17]*Id.*, §311, 15 U.S.C. §3371 (1982).

[18]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 (1985), *vacated and remanded*, Associated Gas Distributors, v. FERC, 824 F.2d. 981 (D.C.Cir. 1987), *cert. denied*, 485 U.S.C 1006 (1988).

[19]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,761 (1987), *remanded*, *American Gas Association v. FERC*, 888 F.2d 136 (D.C.Cir. 1989), *readopted*, Order No. 500-H, III FERC Stats. & Reg. [Reg. Preambles] ¶30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III FERC Stats & Reg. [Reg. Preambles] ¶30,880 (1990), *aff'd in part and remanded in part, American Gas Association, v. FERC*, 912 F.2d 1496 (D.C.Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

[20] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,939 (1992), (Order No. 636), *order on reh'g*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,950 (1992) (Order No. 636-A) *order on reh'g*, 61 FERC ¶61,272 (1992) (Order No. 636-B).

These statutory changes reflect a Congressional determination that producers of natural gas do not have "natural" monopoly power. In other words, the statute reflects the workably competitive nature of the production industry.

Moreover, as a result of physical and technological changes that have taken place as the industry has grown and matured over the last fifty years, a given supply of the natural gas commodity can now be transported — by front haul, back haul, exchange or displacement — to points throughout the continental United States. As a result, as a technical matter, producers of natural gas can market their supplies in an essentially national market while individual customers or resellers of gas (such as the local gas utilities) can obtain supplies from a variety of sources.

These legal and technical changes have already begun to restructure the industry.

The Commission's overriding goal in this docket is to adapt our regulations to these fundamental legal and technical changes so that we may continue to fulfill our statutory mandates under the NGA and the NGPA. Thus, the final rule adjusts, within the scope of the authority delegated by the Congress, those aspects of our current regulations that now appear to hinder the development of competition in those areas where competition will better protect the public interest than will traditional public utility regulatory rules.[21]

---

[21]III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 at 31,470.

Congress deregulated gas prices and the FERC opened access to transportation services. Interstate pipelines, because they are the only means through which natural gas is transported in interstate commerce are the essential links between the buyers and sellers in that deregulated marketplace. Their function and the service provided through them are the essence of interstate commerce in natural gas. Louisiana's attempted tax on the use of compressor fuel must be viewed in that context. The fact that the pipes and compressors that form the interstate pipeline system do not themselves move about like the ferryboat in *Helson* does not change the fact that they are the instrumentalities through which the interstate commerce is conducted. Gas that is produced off-shore of Louisiana can be consumed in Washington, D.C. The only way for that to occur is for that gas to be transported through the interstate pipelines. The Association believes Louisiana's attempted tax is a direct burden on the instrumentalities employed in that interstate commerce. This Court should find that Louisiana's use tax is one that produces a "forbidden effect" under the Commerce clause and is the type of burden the drafters of the Commerce Clause sought to avoid.

II. LOUISIANA INCORRECTLY APPLIES THE TEST ESTABLISHED IN *COMPLETE AUTO TRANSIT*

Louisiana compounds its error of ignoring *Helson* by failing to correctly apply the test established in *Complete Auto Transit*. Louisiana's position is simply this: There is a nexus between Columbia and the state of Louisiana. Therefore, the use tax applied to the natural gas fuel may attach. Louisiana found:

> Columbia's gas production has a substantial nexus with the State of Louisiana. Columbia's pipeline and

> four compressor stations carry natural gas from offshore Louisiana to the state's borders. Columbia pays Louisiana taxes on its employees and activity in the state.[22]

Louisiana's error is that the tax applied here does not seek to tax those activities. Louisiana seeks to tax the use of fuel that moves natural gas in interstate commerce. Louisiana's attempt to tax the use of fuel by Columbia must be compared to the tax applied in *Complete Auto Transit* upon which Louisiana relied. At issue in *Complete Auto Transit* was a tax applied to the specific transactions that occurred within the state of Mississippi. As this Court noted:

> We are advised by the appellee that the tax has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State.[23]

Louisiana seeks not to tax Columbia's gas production, the ownership of the compressor facilities, its payroll or any other of a myriad of other aspects of Columbia's business enterprise that might or could be subject to an appropriate tax because of its local nature.[24] In this respect, Louisiana misapprehends the nature of the test adopted by this Court in *Complete Auto Transit*. This Court did not find that all taxes imposed by the states are appropriate so long as there is some nexus between the state and the *enterprise* being taxed. What is of significance is that there is some nexus between the state and the *activity being taxed*, so long as that activity can be

---

[22]653 So.2d 522, 524.

[23]430 U.S. 274, 276.

[24]A.G.A. takes no position on the propriety of any other taxes, but merely indicates that other events might be taxable which could arrive at a different result.

separated from interstate commerce. Louisiana ignores that distinction and blithely finds that since Columbia can be found doing business within the state, then the tax on the use of fuel is appropriate. The Association believes that such a result ignores the import of *Complete Auto Transit*. In *Complete Auto Transit*, this Court stated:

> We note again that *no claim is made that the activity is not sufficiently connected to the State to justify a tax*, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned. (emphasis added)[25]

The Court was never called upon to determine whether the tax sought to be applied was related to activities within the state of Mississippi. That is not the case here. Columbia rightfully challenges the imposition of a tax on the use of the fuel that provides the sole impetus for natural gas as it moves on its interstate journey. The Association believes that the correct view is that adopted by the Wisconsin Supreme Court. The Court there said:

> Although this activity takes place within the state, we are satisfied that this consumption is an integral part of the process of interstate commerce which does not have a substantial nexus with the state. Thus, it remains immune from state taxation by reason of the Commerce Clause.[26]

There is no nexus between the act of consuming the fuel and the state of Louisiana that is distinct from its character as interstate commerce. There is no doubt that the fuel was con-

---

[25]Note 25, *Supra* at 287.

[26]84 Wis.2d 261, 270, 267 N.W.2d 253, 258.

sumed within the state and, therefore, some nexus with Louisiana exists. But that is not the deciding factor. The deciding factor is whether that nexus is distinct and separate from its interstate commerce. Fuel used in compressors by interstate pipelines is an interstate commercial use inseparable from the pipelines and compressors themselves.

The results reached in *Pledger v. Arkla, Inc.*,[27] *Questar Pipeline Co. v. Utah State Tax Commission*,[28] and *Tennessee Gas Pipeline Co. V. Marx*[29] that agree with Louisiana are also incorrect. The Court in *Questar Pipeline* goes beyond *Complete Auto Transit* and finds that the simple existence of the potential taxpayer within the state is sufficient nexus to establish the validity of the tax. The *Questar Pipeline* court finds:

> The language of *Complete Auto* focuses on the relationship of the taxed activity to the state. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 632 (1977) decided a few weeks after *Complete Auto*, emphasizes, however, that nexus can be determined by looking at more than just the taxed activity.[30]

This conclusion misapprehends this Court's determination in *National Geographic*. There this Court was asked to determine whether the National Geographic Society could be compelled to collect a tax *that had already been determined to be appropriate*. The only question was whether the Society was found sufficiently within the state of California to be compelled to collect the tax and remit it to the state. The validity of the tax itself was not at issue. This Court noted:

---

[27]309 Ark. 10, 827 S.W.2d 126 (1992).

[28]817 P.2d 316 (Utah 1991).

[29]594 So.2d 615 (Miss. 1992).

[30]817 P.2d 316, 318.

> The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the *sole* burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it. (emphasis added)[31]

It is clear that this Court was not addressing in *National Geographic* the fundamental question that is in issue in this case. Namely, whether the tax is, in the first instance, a valid burden on interstate commerce. The courts in *Questar Pipeline, Tennessee* and *Pledger* reached the wrong result because they failed to make this distinction. Some elements of the interstate journey of natural gas must take place within a state. Under a correct reading of this Court's prior decisions, that fact alone is insufficient to permit the imposition of the use tax involved in this case. The fuel used by the elements of interstate commerce, in this case compressors and pipes that form a portion of the national interstate pipeline network, is in and of itself a portion of that interstate commerce. It is not distinct from that commerce but rather integral to the very nature of interstate commerce. To find that the use of fuel in compressors by interstate pipelines is not an integral part of that interstate commerce is to ignore the realities of interstate commerce in natural gas. Even Louisiana recognized this reality:

> Columbia Gulf Transmission Company ... transports natural gas from offshore Louisiana to its affiliate in Kentucky through underground interstate pipelines. The gas loses pressure during the journey and is recompressed at four Louisiana compressor stations.

---

[31]430 U.S. 551, 558.

> Some of the pipeline gas is diverted to the compressor stations, *where it powers the engines which boost the interstate gas pressure*. (emphasis added)[32]

The Association believes that the correct application of this Court's decisions will establish that the use tax in this case produces a "forbidden result" by subjecting interstate commerce to a direct burden. No interstate movement of natural gas can reasonably occur without fuel being used to make it occur. Allowing Louisiana to impose such a tax will permit every other state to impose similar taxes. Interstate Commerce should not be forced to face the specter of such multiple taxes applied to simply moving gas in interstate commerce.

CONCLUSION

The attempted tax by Louisiana is contrary to the Commerce Clause. This Court has expressly found that a tax on fuel used by an instrumentality of interstate commerce is no different than a tax directly on that instrumentality. The direct taxation by the states of instrumentalities in interstate commerce is a "forbidden effect" contrary to the Commerce Clause. Further, the application of this Court's decision in *Complete Auto Transit* by Louisiana is in error. Louisiana misapplies the test established by this Court by first assuming that it "supersedes" this Court's decision in *Helson*, and then by incorrectly applying the test to the facts of this case.

The national natural gas marketplace, as envisioned by both Congress and the FERC, cannot exist without natural gas moving through interstate pipelines. The compressors and the fuel that powers them, for all intents and purposes, are the only

---

[32]653 So.2d 522, 533.

"instrumentalities" that carry on this interstate commerce. This Court should not permit Louisiana, nor any other state to impose the type of tax that is sought to be imposed here. The fuel used to drive the compressors that move the gas in interstate commerce is not distinguishable in any meaningful manner from the act of interstate commerce itself.

The Association and its members are engaged in various aspects of the natural gas marketplace and use and operate the interstate pipeline system, the only means by which the interstate commerce in natural gas can be conducted. The Commerce Clause is intended to preclude the several states from restricting the free flow and development of that commerce. The tax applied in this case and the cases of *Pledger*, *Questar Pipeline* and *Marx* are direct burdens on such interstate commerce, and anathema to Congress' and the FERC's efforts to create a national market. If allowed, these taxes will be born by the Association's members simply because many of them purchase natural gas that is transported in interstate commerce. This Court should grant certiorari in this proceeding to fully address what has been, and will likely continue to be, an area of continuing litigation as the states seek to extend their reach into this growing marketplace. The cases currently decided by several state courts leave the members of A.G.A. at a loss to discern whether the act of moving gas through the several states via the interstate system of pipes and compressors is likely to be burdened by additional taxes as the gas is transported from state to state. Granting certiorari and addressing the issues raised in this matter will be of substantial benefit to all of the elements of the national natural gas marketplace. The Association, on behalf of its

members, believes that this Court should grant Columbia's petition for writ of certiorari.

Respectfully submitted,

AMERICAN GAS ASSOCIATION

David J. Muchow
General Counsel and Corporate Secretary

Dan L. Sanford
Deputy General Counsel

American Gas Association
1515 Wilson Boulevard
Arlington, VA 22209
(703) 841-8533